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Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-540

CITY OF CHICAGO, a municipal corporation, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, Commissioner of the Chicago Board of Health, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, THE CITY OF CHICAGO, a municipal corporation, and its Board of Health, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 6, 1976 (rehearing denied, September 2, 1976).

OPINIONS BELOW

The opinion of the Court of Appeals, filed on August 6, 1976, is as yet unreported. It is reproduced in Appendix D to this brief. The order of the Court of Appeals denying rehearing, entered on September 2, 1976, is reproduced in Appendix E.

An order of the Court of Appeals, entered on September 15, 1976, recalling the mandate and staying it until October 15, 1976, is reproduced in Appendix F.

The findings of fact and conclusions of law of the District Court, entered on September 3, 1975, are unreported, but are reproduced in Appendix A. Defendants' proffered findings of fact and conclusions of law are reproduced in Appendix B. The decree of the District Court, also entered on September 3, 1976, is unreported; it is reproduced in Appendix C. An order of the District Court, staying enforcement of its decree pending final disposition of appeal, conditioned upon petitioners' filing a bond in the amount of $100,000, no surety being required, which was entered on October 14, 1975, is reproduced in Appendix D. (Such bond was approved by the District Court and filed on October 31, 1975.)

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1976 (App. 29 a). On September 2, 1976, the court of appeals entered an order denying the petition of the defendants for a rehearing with suggestions for rehearing en banc (App. 41 a).

The jurisdiction of this Court rests on 28 U.S. Code § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Commerce Clause of the Constitution of the United States (Article I, Section 8) prohibits the City of Chicago, Illinois, from conditioning the granting of a city permit to sell grade A milk and milk products in that city upon on-site inspections by City of Chicago inspectors, of the processor's plant and farm sources of supply, even though such inspections are made outside the State of Illinois.

2. Whether the opinion of the court of appeals herein is is conflict with the ruling of this Court in *Dean Milk Company* v. *City of Madison, Wisconsin,* 340 U.S. 349 (1951).

3. Whether the fact that the City of Chicago does not charge the inspectee for making a milk inspection, even when made out of the State of Illinois, demonstrates that its inspections are not a burden on interstate commerce and constitutes an additional reason why that municipality should be allowed to require on-site inspections by its own inspectors even beyond the boundaries of the State of Illinois.

4. Whether the Commerce Clause requires acceptance of a voluntary reciprocity program of acceptance of milk from out of state on the sole basis of inspection by the health authorities of the state in which the shipper is located.

CONSTITUTIONAL PROVISIONS, STATUTES AND MUNICIPAL ORDINANCES INVOLVED

CONSTITUTION OF THE UNITED STATES.

Article I, Section 8:

"The Congress shall have Power
". . . .
"To regulate Commerce . . . among the several states . . . ."

ILLINOIS STATUTE.

Illinois Rev. Stat. 1975, Ch. 24, par. 11-16-1:

"The corporate authorities of each municipality may provide for and maintain a board of health, consisting of more than one person, and to prescribe its powers and duties. . . ."

MUNICIPAL ORDINANCE.

Municipal Code Of Chicago, Chapter 154:

154-8. Permit to sell. It shall be unlawful for any person to bring into or receive into the City, for sale, or to sell or offer for sale therein, or to have in storage where milk or milk products are sold or served, any milk or milk product unless such person possesses a permit from the board of health . . .

Such permit may be revoked by the board of health upon violation by the permittee of any of the provisions of this chapter or any of the rules and regulations of the board of health, or in any emergency when, in the judgment of the board of health, the milk or milk product handled by the permittee has or may become a public menace, or in any case in which the permittee refuses the board of health the right of entrance to any dairy farm, milk plant, or vehicle, or any other place where milk products are kept or stored, for the purposes of inspection or the collection and examination of samples; provided that the permittee shall, after abiding by such revocation, upon request have the right of a hearing before the board of health.

• • • • •

154-15. Classes of Milk. No milk or milk products shall be sold in the city except Grade A pasteurized milk or milk products and certified milk and milk products.

Grade A pasteurized milk and milk products shall conform with the rules and regulations of the board of health for Grade A pasteurized milk and milk products . . .

154-17. Inspection of dairy farms and milk plants. At least once during each inspection period the board of health shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city. In case the board of health discovers the violation of any item of sanitation, it shall make a second inspection after a lapse of time as it deems necessary for the defect to be remedied, and the second inspection shall be used in determining compliance with this chapter. Any violation of any provision shall be cause for immediate revocation of the permit.

One copy of the inspection report shall be posted by the board of health in a conspicuous place upon an inside wall of one of the dairy farm or milk plant buildings, and said inspection report shall not be removed by any person except the board of health. The original copy of the inspection report shall be filed with the records of the board of health.

154-18. Examination of samples. During each inspection period a number of samples of milk or milk products from each dairy farm and each milk plant,

as designated by the rules and regulations of the board of health, shall be taken on separate days and examined by the board of health. Samples of milk or milk products from stores, cafes, soda fountains, restaurants, and other places where milk or milk products are sold shall be examined as often as the board of health may require. Bacterial plate counts shall be made in conformity with the latest standard methods recommended by the American Public Health Association or any other method approved by the board of health. Examinations may include such other chemical and physical determinations as the board of health may deem necessary for the detection of adulteration, these examinations to be made in accordance with the latest standard methods of the American Public Health Association and the Association of Official Agricultural Chemists or other method approved by the board of health. Bacterial plate counts, reductase test, and cooling temperature results shall be given to the producer or distributor concerned as soon as taken by the board of health at any time prior to the final delivery of the milk or milk products. All proprietors of stores, cafes, restaurants, soda fountains and other similar places shall furnish the board of health, upon its request, with the name of the distributor from whom their milk or milk products are obtained. Bioassays of the vitamin D milk shall be made when required by the board of health in a laboratory acceptable to it for such examinations. Samples of milk and milk products shall be paid for at the market price upon request.

154-19. Products shipped from beyond limits. Milk and milk products from points beyond the limits of inspection may not be sold in the city unless produced and pasteurized under provisions identical with those of this chapter and approved by the board of health. In order that inspections by the board of health may be adequate, thorough, and effective, the board of health may confine its inspections within such points

and territorial limits as the board of health may, from time to time, deem necessary to insure economic and proper supervision, and to safeguard and promote the public health of the city.

• • • • •

154-22. Penalty. Any person violating any provision of this chapter shall be fined not less than five dollars nor more than two hundred dollars for each offense. Each and every day on which the violation of any of the provisions of this chapter occurs shall constitute a separate and distinct offense.

STATEMENT OF THE CASE

This action for declaratory judgment and injunction has been brought against the City of Chicago and its board of health by a milk processing company located in Gary, Indiana. The suit attacks a long established practice of that board of health, mandated by city ordinance, as authorized by Illinois statute, of requiring as a condition precedent to the granting to any milk processor of a license to sell grade A milk and milk products in Chicago, initial and periodic on-site inspections of the processor's plants, milk trucks and dairy farm sources of supply.

The text of the pertinent portions of the Chicago ordinance and of the Illinois enabling statute are set forth in the section of this brief immediately preceding this.

Chicago insists on making these on-site inspections, even though the pasteurization plant and the dairy farms supplying it are situated outside the State of Illinois and even though they are inspected by the health authorities of the

state in which they are located. Section 154-17 of the Chicago milk ordinance requires the inspection of *all* farms whose milk or milk products are intended for consumption in Chicago.

Chicago, however, makes all such inspections free of charge and bears all the expense.

Proceedings Below.

This litigation is based on an amended complaint in two counts, both of which seek a declaratory judgment and permanent injunction. Count I alleges that the milk of the plaintiff (hereinafter called Dixie) is produced and processed under State of Indiana regulations equivalent to those of the 1965 United States Public Health Service Model Grade A Milk Ordinance. Dixie alleges that the State of Indiana inspections guarantee that Dixie's products will be maintained at a level of wholesomeness equal or superior to Chicago standards. The amended complaint also states that Dixie has also obtained a State of Illinois permit on the basis of reciprocity. Count I concludes that inspection of Dixie's milk plant and dairy farms in Indiana by Chicago inspectors would be superfluous and that to require this as a condition precedent to the granting of a Chicago milk permit constitutes an impermissible burden on interstate commerce, in violation of Article I, Section 8, of the Constitution of the United States.

The allegations of Count II are substantially the same as those of Count I, with additional averments that Chicago discriminates against Dixie in supplying its inspection requirement. Count II invokes not only the commerce clause of the Constitution, but also due process of law and

equal protection of the laws guaranteed by the Fourteenth Amendment.

The case was filed on December 23, 1970. From January, 1971, through March 21, 1972, extensive discovery was made and some 12 volumes of depositions accumulated.

Dixie's motion for summary judgment, based on the contention that, as a matter of law, Chicago's refusal to allow Dixie's milk to be sold in Chicago unless Dixie submitted to inspections by Chicago inspectors constituted an unconstitutional burden on interstate commerce, was denied by the district court on June 21, 1972. Judge Bauer, then a district judge, noted (R. 63):

> "It appears . . . that plaintiff has filed no formal application with the city for a permit within the past eleven years, although the dairy has corresponded with the City regarding a permit. Plaintiff submits that it would be futile in light of defendant's attitudes and responses to plaintiff's inquiries into obtaining a permit. Thus, one factual issue still to be resolved is whether, in light of defendant's actions in response to plaintiff's inquiry into the likelihood of its obtaining a permit, it is reasonable for plaintiff to assume that a formal application for a permit would be futile."

Thereafter, on the basis of double on-site inspections of Dixie's facilities and dairy farm sources by City of Chicago inspectors, made during discovery (T. 192), Chicago offered a permit to Dixie. But Dixie rejected the offer, taking the position that any permit granted to it on the basis of City of Chicago inspections was unacceptable for "constitutional reasons" (T. 273, 274).

As a result Dixie's rejection of a Chicago permit, the district court concluded that Count II of the amended complaint, alleging discrimination against out-of-state milk

processors and producers, in violation of due process and equal protection of the laws, was mooted. Accordingly, the district court struck and dismissed Count II on June 19, 1974 (R. 95). No appeal was taken by Dixie from the order dismissing Count II.

After the submission of briefs, the district court granted Chicago's motion for summary judgment as to Count I. The district court rejected Dixie's contention that Chicago's inspection requirement constituted an unconstitutional burden on interstate commerce. It made this ruling in reliance on *Dean Milk Company* v. *City of Madison, Wisconsin,* 340 U.S. 349 (1951), quoting the following statement of this Court therein (at 354, 355):

> "It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely on its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship, for it could charge the actual and reasonable cost of such inspection to the importing producers and processors."

The district court noted that Chicago refrained from exercizing its right to charge for on-site inspections.

Dixie filed notice of appeal from this summary judgment dismissing Count I, though not from the dismissal of its Count II.

On March 14, 1975, the court of appeals reversed the summary judgment dismissing Count I and remanded the case for further proceedings. The order stated:

> "Since significant factual circumstances are in dispute, summary judgment was inappropriate here. Among these factual disputes are: whether the Chicago Board of Health by its administration of Chicago's milk ordinance has discouraged out-of-state milk producers and

> processors from applying for permits to sell Grade A milk products in Chicago; whether the Chicago Board of Health speedily and fairly inspects out-of-state producers without charge; and whether shelf inspections of Grade A milk products would adequately protect the health of Chicago residents. Additional factual details are required to be ascertained regarding the Indiana and federal sanitation standards. Facts are also needed as to the manner, frequency and effectiveness of inspections, the number of personnel involved, the products covered, and the facilities inspected under the Indiana, Chicago and federal inspection systems."

Upon remand the case was reassigned to Senior District Judge Perry for trial.

On September 4, 1975 the district court entered findings of fact and conclusions of law, adopting those submitted by Dixie substantially *in toto.* A decree in favor of Dixie was entered on the same day. These findings of court and conclusions of law are reproduced in Appendix A at the end of this petition. Chicago's proffered findings of fact and conclusions of law are reproduced in Appendix B. The decree of the district court is reproduced in Appendix C.

Chicago's motion for reconsideration was denied on September 19, 1975. At that time, however, the district court stayed enforcement of its decree pending final disposition of an appeal, conditioned upon Chicago's filing a bond in the amount of $100,000, which was done.

On August 6, 1976, the court of appeals affirmed the decree of the district court. (See Appendix D.) Chicago's petition for a rehearing en banc was denied on September 2, 1976. (See Appendix E.)

Upon Chicago's representation that it intended to file a petition for certiorari in this court, the court of appeals stayed its mandate until October 15, 1976. (See Appendix F.)

Dixie's Refusal to Submit to Chicago Inspections.

Respondent Dixie Dairy Company, which was founded in 1899, operates a milk processing plant in Gary, Indiana, where it has 225 employees and a fleet of 70 to 75 retail or home delivery trucks and 15 wholesale trucks. It purchases its milk from 204 dairy farms, of which about half are in Indiana and half in Illinois. Dixie has annual gross sales of about $12,000,000 (T. 261). Two-third of these sales are in Indiana, one-third in Illinois.

Dixie has a State of Indiana permit, based on actual inspections by the health authorities of that state. It also has a State of Illinois permit, issued pursuant to a reciprocity arrangement between those two states within the federal program of supervision of state and local milk inspections administered by the U.S. Public Health Service.

It does not have a City of Chicago permit and therefore does not sell its products in Chicago.

Not since 1955 has Dixie sought a Chicago milk permit. At that time it filled out an application for its plant, its milk haulers and its contingent (at that time) of 365 dairy farms. But it so happened that Chicago had recently adopted new application forms; it referred Dixie's application back to Dixie with the request that it use the new forms (T. 271). No reason appears in the record why Dixie failed to follow through. In 1969 Dixie made an inquiry about obtaining a Chicago permit. It was informed by the city's

chief sanitary officer that the city council was considering admitting out-of-state milk on the basis of reciprocity and that it might be advisable to wait and see what happened. Dixie did not pursue the inquiry further.

Dixie's president, Eskil T. Eskilson, in testifying concerning the foregoing matter, admitted that Chicago had offered Dixie a Chicago permit on the basis of the joint inspections for discovery ordered by Judge Bauer, but that Dixie had rejected the permit, even though there would be no charge by Chicago for continuing inspections (T. 273, 274). Eskilson stated that it is Dixie's position that it should be allowed to sell its milk in Chicago on the basis of Indiana's inspection.

From Eskilson's point of view duplicate inspections are unnecessary. He conceded that second inspections actually cause the farmer little inconvenience. Still he argued that second inspectors might occasion farmers to sell their milk to competitors of Dixie, not operating in Chicago and not subject to two inspections (T. 276-278).

George Jons, a fieldman or troubleshooter for an association of dairy farmers and who previously had been an employee of Dixie for 25 years, gave it as his opinion (T. 367, 368) that most dairy farmers would look for another market rather than be subject to two inspections. But Jons admitted he was not speaking from experience and that he had never actually encountered a dairy farmer who had done this.

Chicago Milk Control Inspections.

The Chicago Milk ordinance was enacted on January 4, 1935, and the Chicago Board of Health adopted rules and regulations thereunder on January 8, 1935 (T. 309). These

regulations, together with amendments and additional regulations, up to February 22, 1971, were admitted into evidence as Plaintiff's Exhibits 7 and 8.

The dairy inspections division of the Chicago Board of Health has a staff of 29 inspectors, 4 supervising dairy inspectors, 2 assistant chiefs and one chief of dairy inspection. They are all registered sanitarians (T. 300); most of them have been farmers and most of them have had many years experience as inspectors (T. 303, 304). It is not anticipated that the licensing of the Dixie Dairy Company would require the hiring of additional inspectors (T. 295).

Under the Chicago ordinance, all producer dairy farms are required to be inspected prior to the issuance of a permit and at least once each six months thereafter (T. 305). Some are inspected more often. Between 10,000 and 10,500 dairy farms hold Chicago Board of Health permits. That results in a work load of approximately 500 farms per inspector (T. 308), or approximately 88 farms a month, 5 or 6 farms per workday (T. 318).

Assistant Commissioner Edward F. King of the Chicago Board of Health testified (T. 388) that the board currently inspects 37 pasteurization plants and that approximately half of these are located outside of Chicago. Among the pasteurization plants that Chicago inspects are the Hawthorne Mellody plant at Whitewater, Wisconsin, the plant of Galloway West (a Borden subsidiary) at Fond Du Lac, Wisconsin, and the Dean Milk Company plant at Janesville, Wisconsin.

The Chicago milk ordinance does not set any geographical limits on the city's milk inspection (R. 313). The chief sanitary officer of the City of Chicago, James Meany, declared that the Chicago Board of Health will go any place to inspect milk sources and pasteurization facilities.

Meany conceded that milk control based on reciprocity is "a possible second attentative method" of protecting the City's health (T. 346). He also admitted that in 1969 he had recommended to a city council committee the adoption of an amendment which would have empowered the board of health to use reciprocity in some instances *in its discretion,* as a matter of administrative convenience in the event of a shortage of personnel (T. 348-350). Some representatives of the dairy industry had supported this proposal, and some opposition had come from labor unions (T. 351, 352). The suggestion was not adopted.

The position of the City's health authorities was stated by Assistant Commissioner King (T. 386):

> ". . . [T]here are many Grade A programs in the country and I believe, firmly believe, that the only way a municipal jurisdiction can insure that its products are in fact wholesome and on an assay basis is through having a program of regular inspection survey of facilities that are responsible for the production and pasteurization and distribution of the product."

Meany explained that when the board receives an inquiry with respect to obtaining a Chicago permit, he responds immediately, inviting the inquirer to come into his office and to bring along a blueprint or scale drawing of his plant. This is studied by the staff to ascertain the construction and various functions of the plant, floor-wall-ceiling construction, water outlets, ice boxes, employees' toilet and handwashing facilities, refrigeration, loading docks and all the equipment (T. 415). The board also inquires into the applicant's over-the-road hauling arrangements.

After the board has completed these preparatory studies and perhaps suggested corrections in the applicant's facilities, the pasteurization plant is then inspected "as quickly as the plant is ready to have us make the inspections" (T. 416). Then Chicago inspectors visit several of the applicant's farm sources of supply. Deficiencies are pointed out and the farms are thus prepared for the permit inspection (T. 419). Forms for applying for a permit are then furnished to the dairy company and its supplying farms.

Next each of the farms furnishing milk to the applicant is visited by a Chicago inspector. If the farm passes, it is given a certificate (T. 421).

The Chicago ordinance meets the standards of and encompasses the model ordinance of the U.S. Public Health Service (T. 423). Under the ordinance, after the permit is issued, each farm must be inspected at least once every six months and pasteurization plants once in each three months. Samples of the milk of a farm are, under the ordinance, to be taken four times in each six months, but it is board policy to take them every month (T. 424). Records are kept of the bacteriological tests, butterfat, temperature, antibiotics and inhabitors of bacterial growth in the samples. The commingled milk of groups of farms is also tested each month (T. 425). This procedure is not required by the ordinance, but the board considers it an effective check. The presence of antibiotics, for example, precipitates an immediate cut-off (T. 428, 434).

In conclusion, Meany stated it is his opinion (T. 436) that reliance on one's own inspectors is preferable to reliance on reciprocity and that requiring inspection by Chicago inspectors affords better protection to the health, safety, and welfare of the citizens of Chicago.

The Federal Program Of Recommended Standards For State And Local Milk Control.

The federal program for certification of interstate milk shippers was explained in the testimony (T. 35-155) of Charles D. Price, regional milk sanitation specialist for Region 5 of the U.S. Public Health Service Food and Drug Administration. Region 5 includes the states of Illinois, Indiana, Minnesota, Michigan, Ohio and Wisconsin, which produce 40 percent of the milk consumed in the United States.

The federal program, which is built around the model Pasteurized Milk Ordinance (PMO) (Plaintiff's Exhibits, 1-3; T. 40), formulated in 1965, is not compulsory under federal law. It is a voluntary system that is recommended by the USPHS. The provisions of the model PMO, according to the testimony of Price, have been *voluntarily* adopted by 40 states, 512 counties and 1,435 municipalities (T. 42).

Section 11 of the model ordinance contains provisions for accepting milk "beyond the limits of routine inspection" of the health authority of the receiving jurisdiction. The USPHS takes the position that the receiving jurisdiction may accept without inspection milk from shippers located outside the receiving jurisdiction who have been awarded a sanitation compliance rating of 90 percent by a state milk sanitation officer who has been certified by the USPHS (T. 49).

For example, in the case of a dairy, located in Indiana and under inspection by the Indiana State Board of Health, shipping into Illinois, the procedure outlined by Price (T. 53, 54) is as follows: First, the State of Illinois ascertains that the State of Indiana and the particular dairies are par-

ticipating in the cooperative program for certification of interstate milk supplies. Then Indiana notifies the USPHS that Indiana is supervising this particular supplier in compliance with the cooperative agreement and that the plant is in conformity. Thereupon the USPHS includes this as a document advising all states what the plant's home state rating is, without approving it. The various states can then decide for themselves whether they are going to accept the milk or not (T. 53, 54).

The sanitation ratings by the states of their milk plants which are sent to the USPHS are published by that agency quarterly. The validity of the state ratings are checked by USPHS audit inspections, which are made every year on a random selection basis (T. 63).

USPHS publication number 678, entitled "Methods of Making Sanitation Ratings of Milksheds", which was admitted into evidence (T. 55-57), sets forth the sampling procedure to be followed in surveying dairy farms and milk plants.

Price explained that a survey is not a regulatory inspection, but a statistical sampling of a given number of farms, with a view to ascertaining the overall picture (T. 58). For example, if there were between 148 and 167 farms in a milkshed shipping to a plant, the surveying agency would pick at least 36 farms at random out of the group and inspect each of these 36. Each farm would have an equal chance of being selected. Such surveys are made at least every two years (T. 58, 59).

The survey is made by a state milk sanitation rating officer who has been certified as competent by the USPHS after an on-the-job examination, consisting of joint inspections by the state officer and a federal officer of 25 farms and at least five plants.

In a survey by a federally certified state officer, each farm in the sample is inspected. Then the sanitation rating for the milkshed as a whole is determined in accordance with a weighted average. Thus, a large milk farm that hauls 10,000 lbs. of milk will have 10 times the weight in the rating as a producer hauling 1,000 lbs. of milk (T. 61).

Compliance is rated according to a point system, with 100 percent constituting maximum compliance. But in these audit inspections a "permissible tolerance" is allowed. Price explained (T. 65) that, because the federal inspector does not see enough farms to constitute a "true statistical sampling to get the complete picture," farms and plants can deviate from the state report on them by a certain percentage and still be deemed in compliance. If a farm is within 5 points of the state rating and above 90, it is considered in compliance. If a farm is more than 5 percentage points below its rating by the state, the USPHS asks the state to make a resurvey within 60 days. If the federal audit is below 85, the USPHS immediately withdraws certification and requests the rating state to notify all receiving states. As for pasteurization plants, if a plant is below 90 percent, the USPHS has the state reinspect it within 30 days. If it is below 80 percent, the USPHS requests immediate withdrawal by the state of the firm's milk shipper's certificate. If the shipping state refuses to reinspect, the USPHS notifies the receiving states. If the shipping state refuses to permit federal audit inspections, the USPHS will delete all shippers in that state from the next publication of acceptable ratings.

On cross-examination, Price admitted (T. 110) that the USPHS does "not have any enforcement powers whatsoever." If it comes upon a violation, all it can do is to report it to the state having jurisdiction. He also admitted that federal inspection is merely a sampling of a "random selection" of farms (T. 110). He also conceded (T. 111) that determination of the rating of particular dairy farms is based on how much weight of milk they ship into the particular pasteurization plant. In response to a question whether a group of say, 34 farms, producing a large amount of milk, could achieve a 90 rating and still include a large number of farms with a rating below 90, Price said he had never found a milkshed that did not have farms below 90. He admitted (T. 111) that if the USPHS reported to a state authority that a particular farm was in violation, the USPHS would not know whether the state authority took action to correct it. Price conceded (T. 112, 113) that, if the state authority gave a farm 2 years time to correct a serious violation, the USPHS would have no knowledge of that, it would not affect the rating, and in the meantime, out-of-state receivers would be receiving milk produced in violation of the standards.

There are only three persons in the regional office of Region 5 of the USPHS-FDA in Chicago, although it is charged with supervising milk production in six states that produce 40 percent of the milk consumed in the nation (T. 134).

Indiana Milk Inspection.

Exposition of the milk inspection system of the State of Indiana was done primarily through the testimony of Donald R. Kimball (T. 156-242), director of the Division of

Dairy Products of the Indiana State Board of Health in Indianapolis.

Indiana has substantially adopted the provisions of the 1965 model ordinance. It also participates in the cooperative federal-state program for rating interstate milk shippers. There are 42 employees in and working out of the Indianapolis office. Of these 18 are sanitarians who inspect dairy farms, 18 sanitarians who inspect dairy plants.

The normal limits of Indiana inspection include all pasteurization plants in Indiana (but no plants outside Indiana), together with all farm shipping milk to those plants (T. 189). Indiana inspectors inspect about 3000 dairy farms in Indiana. Indiana inspectors also inspect about 125 dairy farms in Michigan (T. 222), 350 dairy farms in Illinois (T. 223) and 40 dairy farms in Ohio. Thus, the Indiana Board of Health inspects more than 500 dairy farms located outside Indiana—about one-sixth of the total number of farms checked.

Indiana accepts milk reciprocally from pasteurization plants in Illinois, Wisconsin, Minnesota, Iowa, Kentucky, Ohio, Michigan, West Virginia and Pennsylvania on the basis of inspection by the health authority of the shipping state (T. 185, 186). Milk is shipped from Indiana to Illinois (outside Chicago), Iowa, Kentucky, Tennessee, West Virginia, Ohio and Michigan on the basis of inspection by Indiana only, without inspection by the receiving jurisdictions (T. 188).

Side-By-Side Inspection Of Dixie's Plant And Farms By Indiana And Chicago Inspectors.

As a matter of discovery, the district court in October, 1972, authorized the Chicago Board of Health to send its

inspectors to inspect Dixie's plant and dairy farms. Dixie agreed. However, at Dixie's request, Indiana inspectors were permitted to accompany the Chicago inspectors (T. 192).

There were four inspectors from Chicago and three from Indiana assigned to the project, which Kimball participated in personally. Working side by side in teams of two and rotating the teams, each inspector made out his own inspection sheet. At the end of the week, when all the farms had been inspected, the inspectors compared results (T. 194). The reports were stapled together.

A joint inspection was made of each of the 204 dairy farms supplying Dixie (T. 214, 215). Not all the farms were in Indiana; about half of them were in Illinois. The area covered extended roughly from O'Hare field south to Kankakee, Illinois, then east to Rensselaer, Indiana, then north to the Indiana-Michigan border near Michigan City, Indiana (T. 216).

The weighted volume rating for all the farms surveyed, as compiled by the Indiana inspectors, was 91 percent compliance (T. 198). The rating the Chicago inspectors gave the same farms was 88 percent compliance (T. 199). The Indiana inspector's rating of the Dixie plant in Gary was 94 percent compliance (T. 199, 201). The Chicago inspectors rated the Dixie plant as 84 or 85 percent in compliance (T. 203).

The Chicago inspectors gave demerits for wash and rinse vats in the milkhouses if the vats were not made of stainless steel (T. 207). Demerits were also given by the Chicago inspectors to farms that used pieces of plaster tubing that could not be looked through from the outside to the inside diameter of the tubing.

More importantly, in the matter of cattle drinking cups or submerged inlets, the Indiana inspectors were lax. Some of the cattle drinking cups on Indiana farms supplying Dixie were constructed so that the inlet for the water coming into the cup was below the floor level rim of the cup itself.

On cross-examination, Kimball was reluctantly constrained to admit that, on page 107, the model ordinance states:

> "The casing of every well shall terminate above the ground level."

At the time the joint inspection was completed, Indiana was very gradually phasing out its cattle drinking cups of submerged inlet construction (T. 211). But Indiana was not debiting these cups that were eventually to be replaced. On the other hand, if there is one such substandard drinking cup in a barn, the Chicago inspectors debit the farm (T. 212). The federal authorities have since instructed the Indiana Board of Health that it must start debiting these substandard drinking cups (T. 214).

The model ordinance (T. 210-236) plainly states, under Item 87, as to water supply for dairy cows:

> "Water for milkhouse and milking operations shall be from a supply properly located, protected, and operated, and shall be easily accessible, adequate and of a safe, sanitary quality."
>
> " • • • • •
>
> "This item is deemed satisfied when:
>
> " • • • • •
>
> "There are no submerged inlets through which a safe water supply may be contaminated."

A buried seal is a sanitary seal of the well that is terminated below the ground surface (T. 233-237). It violates the model ordinance which states (at p. 107), "The casing of every well shall terminate above ground level."

The items of cattle drinking cups fed by submerged inlets and equipped with buried seals are grave enough to draw, on the scale of debit points of the model ordinance (Plaintiff's Exhibit 39), a demerit of 5 points, where 90 out of 100 possible points is passing.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE RULING OF THIS COURT IN DEAN MILK COMPANY vs. CITY OF MADISON, WISCONSIN.

Since 1935, the City of Chicago, by its city council has adhered to the milk control practices which we have set forth in unavoidable detail. It has continued to do this in reliance upon the ruling of this Court in the well-known case of *Dean Milk Company* v. *City of Madison, Wisconsin,* 340 U.S. 349 (1951), which has never been overruled by this Court.

In *Dean,* it will be recalled, in striking down a city ordinance making it unlawful to sell any milk as pasteurized unless it had been processed and bottled within five miles of the center of the city, and unless it came from a dairy farm located within 25 miles of the same, this Court set forth two alternative procedures a municipality may employ, either of which is constitutionally permissible.

One alternative is to follow the reciprocity provision of the model ordinance formulated by the USPHS. The other permissible alternative is for the City to rely on its own inspectors, regardless of the distance from the city of the sites inspected. In the words of this Court in *Dean* (340 U.S. at 354, 355):

> "If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such in-

spection to the importing producers and processors, *G. Sprout* v. *South Bend,* 277 U.S. 163, 169, 72 L.ed. 833, 836, 48 S. Ct. 502, 62 ALR 45 (1938), see *Miller* v. *Williams,* 12 F. Supp. 236, 242, 244 (D.C. Md. 1935)."

That determination is in accord with the long line of authoritative precedents recognizing that, in the absence of preempting federal legislation, the Commerce Clause of the United States Constitution (Art. I, Sec. 8) does not prohibit state or local legislation, enacted pursuant to the police power of the state or municipality, for the evident purpose of protecting the health, safety or welfare of the community, even though such legislation may have some effect on interstate commerce. *Willson* v. *Black Bird Creek Marsh Co.,* 2 Pet. 245, 7 L.Ed. 412 (1829); *License Cases,* 5 How. 504, 12 L. Ed. 256 (1847); *South Carolina Highway Department* v. *Barnwell Bros.,* 303 U.S. 177 (1939); *Milk Board* v. *Eisenberg,* 306 U.S. 346 (1939); *California* v. *Thompson,* 313 U.S. 109 (1941); *H.P. Hood & Sons* v. *Du Mond,* 336 U.S. 525 (1949); *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & P.R. Co.,* 393 U.S. 129 (1968).

However, the court of appeals is of the opinion that the principle enumerated in *Dean* has been modified, indeed, drastically modified by this Court's recent opinion in *Great Atlantic and Pacific Tea Company* v. *Cottrell,* ..... U.S. ....., 47 L.Ed.2d 55, 95 S. Ct. 923, 44 L.W. 4240—decided February 25, 1976). That *Cottrell* was considered determinative here is clear from the court of appeals' opinion, which plainly states (App. 34a):

> "Before the formulation of the balancing test in *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137, 142 (1970), and the reaffirmation of that test in *Great Atlantic and Pacific Tea Co.* v. *Cottrell,* 96 S.Ct. 923, the argument in favor of the Chicago milk ordinance would have been more persuasive."

The court of appeals has found that in *Cottrell* the reference in *Dean* to the permissible alternative open to a municipality of making its own inspections, no matter where, is now "qualified" by the phrase "[i]n the absence of adequate assurance that the standards of a sister state, either as constituted or as applied, are substantially equivalent to its own."

Evidently the court of appeals regards possession of a permit from the health authorities of another state, certified by a USPHS spot-check, as sufficient "assurance."

Thus, the court of appeals' opinion, without any mandate from the Congress, quietly converts the voluntary reciprocity program fostered by the USPHS into a mandatory, obligatory arrangement, unless the municipality can prove that it does not have adequate assurance that the standards of the out-of-state jurisdiction are substantially equivalent to its own.

Cottrell was not a health case. Like *Pike* v. *Bruce Church, Inc.,* it was a purely economic dispute. Although the plaintiff in *Cottrell* was seeking a permit to distribute Louisiana milk in Mississippi, the permit was being denied, not for considerations of health, but solely under a Mississippi regulation excluding milk from another state unless the other state accepted Mississippi's milk on a reciprocal basis. As this opinion of this Court in *Cottrell* (47 L.Ed 2d at 63) incisively remarked:

> "Mississippi's contention that the reciprocity clause serves its vital interests in maintaining the State's health standards borders on the frivolous. The clause

clearly does not do so in the sense of furthering Mississippi's established milk quality standards. For according to the State's brief, p. 9, '§11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers, if the forwarding state will do the same.' Thus, even if Louisiana's standards were lower than Mississippi's, the clause permits Louisiana milk to be admitted to Mississippi if Louisiana enters into a reciprocity agreement. The reciprocity clause thus disserves, not promotes any higher Mississippi milk quality standards."

The coerced reciprocity, which in *Cottrell* Mississippi sought to impose, was a strictly economic measure that operated as an obvious barrier to the flow of interstate commerce. It was disruptive of the national common market created by the Commerce Clause of the Constitution and was intended to have that effect.

The Chicago milk ordinance, on the contrary, is an enactment in the proper local domain of health regulation. Somehow or other the opinion of the court of appeals loses sight of the fact that it is dealing with a legislative enactment, which is, of course, presumptively valid. "Since the area is one that is properly of local concern, the means chosen to accomplish that end are to be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing evidence." *Procter and Gamble Company* v. *City of Chicago*, 590 F. 2d 69, at 76 (7 Cir. 1975), cert. den. 421 U.S. 978 (1976).

Dixie has not even attempted to prove that the means chosen by Chicago to assure the purity of its milk are not reasonably effective to accomplish that purpose.

The invocation of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), by the court of appeals is also confused. This Court explicitly stated in *Pike* (at 143, 146):

> "We are not, then, dealing here with 'state legislation in the field of safety, where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State.
>
> ". . . . [H]ere the State's interest is minimal at best."

Thus, by its own terms, *Pike* is inapplicable to state or local enactments in the field of safety or to legislation designed to protect the health of consumers from contaminated food.

It will be recalled that *Pike* concerned an Arizona statute which prohibited the shipment of cantaloupes out of Arizona unless they were packed in containers in a manner approved by the state. The ostensible purpose of the statute was to enhance the reputation of Arizona cantaloupes. It sought to do this by requiring Arizona grown cantaloupes to be packed in packing sheds located in the state of Arizona. The plaintiff's shed was located in California, 31 miles from its Arizona sources of supply. To have built the requisite facility in Arizona would have entailed an expenditure by the plaintiff of $200,000 and in the meantime the $700,000 cantaloupe crop in Arizona would have been lost.

Thus, in *Pike* there was a strong element of direct discrimination against out-of-state enterprise in the guise of promoting good will for Arizona produce. In the case at bar, on the other hand, the purpose of the Chicago ordinance is to protect the health of that community from recog-

nized dangers of contamination by providing for a double-check by Chicago inspectors, at Chicago's expense, of all the sources of all milk offered for sale in Chicago.

The Arizona statute in *Pike* required cantaloupe enterprises to locate their packing facilities within that state, whereas the Chicago ordinance here under scrutiny in no way affects the location of Dixie's plant or farm sources, but merely requires their submission to inspection by inspectors under the control of Chicago. These inspections are conducted at no cost to the inspectees, whereas in *Pike* compliance would have cost the shipper almost a million dollars.

II.

THE OPINION OF THE COURT OF APPEALS HAS ERRONEOUSLY INVALIDATED THE CHICAGO MILK CONTROL ORDINANCE SOLELY ON COMMERCE CLAUSE GROUNDS.

THE CHICAGO ORDINANCE IN NO WAY BURDENS INTERSTATE COMMERCE.

No Indiana dairy farmers testified that they could not afford to sell to Dixie if they were to be subjected to Chicago inspections in addition to Indiana inspections. There was not even testimony based on experience, that dairy farmers have a psychological aversion to duplicate inspections carried out a few times a year. The president of Dixie, Eskilson, merely stated self-servingly that it was a hardship for producers to be subjected to varying interpretations of the same standards by two different authorities. But Eskilson was not present during any inspections by Chicago inspectors of any of his suppliers and had no direct knowledge of what occurred. Eskilson pointed to no actual differences of interpretations of the

same standards by Indiana and Chicago inspectors. Indeed, Eskilson, in response to the following question put to him by Dixie's own counsel, gave the following answer:

> "Q. Well, do you feel that if your procedures are subject to a second interpretation and a second inspecting authority, that you may lose those producers to one of your dairy competitors?
> "A. I'm not saying it would happen, but it could happen."

Eskilson also made the following admission in response to the following question by the district court:

> "The Court: So except for the psychological effect of it, the real personal inconvenience of having a second inspection, forgetting the psychological part and forgetting the confusing part that he spoke of, it does not cost the farmer very much time or effort, does it?"
> "A. Not a great deal, sir, not a great deal."

Such a putative burden is no burden at all. The weakness of Eskilson's testimony is eloquent.

The opinion of the court of appeals (App. 36 a) admits that the burden imposed on interstate commerce by the Chicago Milk Ordinance "might not appear excessive", were it not for an alleged lack of out-of-state milk processors with Chicago permits. Yet the opinion (App. 38 a) admits there is a "paucity of evidence on this subject."

Surely, it would not have been difficult for Dixie, with the help of the suboena power, to have proven by direct testimony that out-of-state processors are discriminated against, if such were a fact.

Indeed, discrimination is not even an issue in this case. As the opinion of the Court of Appeals (App. 32 a) itself notes, the amended complaint herein originally contained a

count two, which alleged discrimination against interstate commerce. This count was stricken when Dixie, after inspection by Chicago inspectors pursuant to discovery in the district court, was offered a permit which it declined. The striking of the discrimination count was not appealed. Therefore, discrimination is not an issue in this case, although the opinion of the court of appeals seems to turn upon it.

It is distinctly less than candid for Dixie to shed tears over the inconvenience that Chicago inspections would be to its Indiana dairy farmers, while the Indiana Board of Health continues to inspect more than 500 dairy farms in Illinois, Michigan and Ohio (R. 222-225). This total of 500 farms includes approximately half of Dixie's 204 dairy farms, which are located in Illinois (T. 214-216).

And we again respectfully remind the Court that Chicago's out-of-state milk inspections are made at no cost to the inspectees, although under this Court's opinion in *Dean*, Chicago is entitled to charge its expenses to the applicant or holder of a milk permit.

That, as a result of inspections by Chicago inspectors, some of Dixie's dairy farm suppliers may be required to clean up the watering troughs of their cattle does not rise to the dignity of being an unconstitutional burden on interstate commerce.

III.

THE OPINION OF THE COURT OF APPEALS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Again and again the opinion of the Court of Appeals commits the error of accepting the findings of the District court as evidence instead of determining whether these

findings are supported by substantial evidence in the record (App. 37 a, 38 a, 39 a).

The Court of Appeals also erred in dismissing the deficiencies of Indiana inspections with respect to the sources of drinking water for dairy cattle as trivial. The evidence clearly showed that, under the model ordinance promulgated by the USPHS, the item of drinking cups fed by submerged inlets and the item of buried seals are grave enough to draw a demerit of 5 points, where 90 out of a possible 100 points is passing.

IV.

WITHOUT CONGRESSIONAL MANDATE, THE OPINION OF THE COURT OF APPEALS MAKES THE VOLUNTARY RECIPROCITY PROGRAM MANDATORY.

The opinion of the court of appeals in the case at bar stands the ruling of this Court in *Great Atlantic and Pacific Tea Company* v. *Cottrell*, ... U.S. ....., 47 L. Ed. 2d 55 (1976), on its head. Whereas in *Cottrell* this Court barred the forcing of a health jurisdiction "into even a desirable reciprocity agreement," the court of appeals here undertakes to compel a health jurisdiction to enter into a reciprocity agreement, a reciprocity agreement it does not deem desirable, with another health jurisdiction whose enforcement of standards is lax.

According to the testimony of the regional milk sanitation specialist for the midwest region of the USPHS-FDA, Charles D. Price, the model Pasteurized Milk Ordinance (PMO), with the reciprocity provision contained in its Section 11, is not a federal law, but merely a set of recommendations of the USPHS (T. 114). Yet the opinion of the court of appeals rules that it is an unconstitutional bur-

den on interstate commerce for a municipality to require of applicants and permittees submission to its own out-of-state inspections, even without charge, unless it can establish that it does not have "adequate assurance that the standards of [the] sister state, either as constituted or as applied, are substantially equivalent to its own."

There has been no federal legislation preempting the field of interstate milk control to regulation by the USPHS. In the absence of such preempting legislation by Congress, there is no constitutional restriction on state or local legislation enacted pursuant to the police power of the state or municipality, requiring on-site inspection by that jurisdiction of the sources of out-of-state milk being shipped into that jurisdiction for the evident purpose of promoting the health of its community. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 235, 7 L. Ed. 412 (1829); *Milk Board* v. *Eisenberg*, 306 U.S. 346 (1939); *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Dean Milk Co.* v. *City of Madison, Wisconsin*, 340 U.S. 349 (1951).

The opinion of the court of appeals also completely overlooks the fact that the terms of the reciprocity provision, section 11, of the model ordinance, authorize accepting, on a reciprocal basis, milk produced "beyond the limits of routine inspection" of the health authority (T. 48, 49).

Dixie is located in Gary, Indiana, about 50 miles from downtown Chicago, not more than an hour away by the expressway. That is about one-fourth as far away as the milk plant in Fond du Lac, Wisconsin, that Chicago regularly inspects (T. 388). Dixie's pasteurizing plant and dairy farms are well "within the limits of routine inspection" of Chicago. By its own terms, the reciprocity provision is not properly applicable here.

CONCLUSION

Chicago's decision to rely upon its own milk inspections, conducted by personnel under its control, is a reasonable act of legislative discretion. Direct experience is more adequate than reliance upon someone else's experience and a third party's spot check. Double-checking what has been checked by someone else is more reliable, more accurate than relying upon a check by someone else. In matters of safety, maximum safety is a matter of right.

For the foregoing reasons, it is requested that a writ of certiorari issue and that the judgment of the court of appeals be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIXIE DAIRY COMPANY, a corporation,
Plaintiff.
vs.
THE CITY OF CHICAGO, a municipal corporation, et al.,
Defendants.
No. 70 C 3212

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried without a jury. The Court heard argument of counsel and now considers all of the evidence of the parties and the argument of their respective counsel and hereby makes and enters findings of fact and conclusions of law thereon.

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief under the provisions of 28 U.S.C. §2201, seeking to declare unconstitutional, as a burden upon the free flow of interstate commerce in milk and milk products in violation of Article I, Section 8, of the United States Constitution, the action of defendants in refusing to grant plaintiff a permit to sell and distribute Grade A milk and milk products in Chicago unless plaintiff submits to initial and continuing inspections by the Chicago Board of Health.

(Appendix A)

2. Plaintiff, Dixie Dairy Company, is a dairy located in Gary, Indiana. Dixie's plant and producers are licensed by the States of Indiana and Illinois pursuant to standards and regulations promulgated by the United States Public Health Service (U.S.P.H.S.). Dixie sells Grade A milk and milk products in Illinois and Indiana and has been engaged in business as a dairy since 1899. In 1974, Dixie had sales of approximately $12 million, $8 million in Indiana and $4 million in Illinois.

3. Defendants are the City of Chicago, the City of Chicago Board of Health, which agency is charged with the enforcement of the ordinances of the City of Chicago relating to the regulation of the production and pasteurization of milk and milk products and with the issuance of permits to dairies and milk product plants selling milk within the corporate limits of the City of Chicago, and Dr. Murray Brown, the Commissioner of the Chicago Board of Health, and Dr. Eric Oldberg, Mr. Samuel A. Goldsmith, Dr. Theodore Lawless, Mr. Walter Mullady, Dr. Lee Strohl, Dr. Robert Stepto, Mr. Edward F. Brabec, Dr. Mary Kelly Mullane and Dr. Leroy P. Levitt, individual members of the Chicago Board of Health.

4. Beginning in the 1950's and continuing until the commencement of this litigation Dixie sought a permit from the City of Chicago to allow it to sell its milk in the City. Dixie last sought such a permit in 1969 when it requested the Chicago Board of Health to allow it to sell in Chicago based upon Indiana and U.S.P.H.S. inspection of Dixie's plant and producers. Chicago refused to grant a permit on those grounds and stated that as a matter of policy the grant of a permit to any milk processor would have to be

(Appendix A)

conditioned upon initial and continuing inspections by the Chicago Board of Health.

5. In 1970 Dixie filed this action seeking to declare unconstitutional Chicago's refusal to grant it a permit, alleging that inspection of Dixie's plant and producers by Indiana State Board of Health authorities and the U.S.P.H.S. was adequate to protect Chicago's legitimate health interests.

6. Dixie's plant and producers were regularly inspected by the Indiana State Board of Health. Donald Kimball, Director of the Division of Dairy Products of the Indiana State Board of Health, testified that his division employs 18 farm inspectors, 15 plant inspectors and 2 survey men. All but one of the inspectors is a registered sanitarian who achieved that designation by qualification and examination.

7. The State of Indiana has adopted the United States Public Health Service Model Milk Code (PX 3) and procedures and regulations (PX 39, PX 40) as the basis of its milk sanitation program (See PX 5 and PX 58, the Indiana statute and regulations). In addition, Indiana has entered into the federal-state cooperative program administered by the United States Public Health Service. Pursuant to Indiana's milk sanitation program, all dairies desiring a license to sell milk must submit their pasteurization plant and each producer source shipping raw milk to the plant to an initial compliance inspection. Both the plant and each of the producers must meet all standards to pass the initial inspection.

After a plant and its producers qualify for a license they are subject to regular continuing inspections. If during

any phase of these inspections an imminent health hazard is discovered, the milk is immediately removed from the market. The federal market administrator and all plants receiving the milk are notified by telephone of the suspension. As a matter of practice, Indiana inspects all producers three to four times a year. At these inspections every item on the inspection sheet is checked and violations noted. Violations which do not rise to the level of a health hazard are required to be corrected within a time specified by the department. The time varies with the seriousness of the violation. A second violation subjects a producer to suspension of his permit.

In addition to physical inspection of the producer farm, each day milk is picked up from the farm, a sample is taken by the milk hauler. The PMO requires that these samples be tested for bacteria and the like a minimum of four times in every six-month period. The tests must be conducted by a laboratory certified by the Indiana State Board of Health. Dixie Dairy is one of the few dairies in Indiana which maintains such a certified laboratory. If two of the last four tests show violations of the standards, the producer is served with a warning notice. Another sample is examined within 14 days and if that also proves violative of the standards, the producer's permit is suspended.

The producers are subject to two further inspections. First, every 12 to 18 months the survey section of the Indiana Board of Health, as part of the federal-state cooperative Interstate Milk Shippers' Program, inspects a random sample of producers to derive an interstate milk shipper's (IMS) rating. The survey officers are certified by the U.S.P.H.S. The survey includes an inspection of all

Indiana inspection reports made since the last survey as well as a review of the laboratory results on all samples. Second, the U.S.P.H.S. makes a check or audit survey of a randomly selected sample of producers to determine if the Indiana survey is accurate.

Indiana pasteurization plants are inspected as a matter of practice every week. This inspection involves a review of every item on the inspection sheet. Violations are required to be remedied within the time specified. In addition, at least four times in every six-month period samples of all commingled raw milk and all finished products are taken and checked for excessive bacteria, coliform, and similar undesirable qualities. These samples are sent directly to the Indiana State Board of Health laboratory in Indianapolis where the analysis is made. If two of the last four samples show high counts, another sample is examined within 14 days. If that proves unacceptable, the plant's permit is suspended. These tests demonstrate that Dixie's milk is extraordinarily wholesome. For example, whereas the acceptable bacteria count per millimeter is 20,000, Dixie's typical counts are 100 to 500 (PX 59).

Finally, like the producers, the plants are surveyed by the Indiana survey officers for the IMS ratings every 12 to 18 months. These survey results are audited by the U.S.P.H.S. survey officers.

The State of Indiana also conducts several other regular inspections. First, bulk milk haulers are inspected three times a year. A check is made to see that they have proper sampling equipment and that that equipment is properly used. Pick up techniques are reviewed, and the bulk tank

truck is extensively examined. Second, the bulk milk tank at each farm is regularly inspected. The Indiana law requires that milk must not sit in a tank for longer than 48 hours. Third, an antibiotic test is conducted at least eight times annually. If antibiotics are found, no more milk may be shipped until a good sample is taken. Finally, Indiana conducts tests for radiological samples.

8. In addition to the Indiana inspection program, Dixie is subject to survey and ratings by the U.S.P.H.S. Mr. Charles Price, Regional Milk Specialist for the U.S.P.H.S. division of the Food and Drug Administration, testified concerning the milk sanitation standards adopted by Indiana and the nature of the federal-state cooperative milk program. The details of that program are set out in "Procedures Governing the Cooperative State-Public Health Service Program For Certification Of Interstate Milk Shippers (1973 Revision)" (PX 40). Each state which enters the program must first adopt the PMO as its basic milk sanitation statute. In addition, the states must adopt the methods of enforcement of that program set out in "Methods Of Making Sanitation Rating Of Milksheds" (1966 Edition) (PX 39). Mr. Price testified that 45 states and over 1,400 municipalities have adopted the PMO. Basically, the program requires that, in addition to its regular inspections, at least once every two years, state survey officers trained and certified by the U.S.P.H.S. must inspect a sample of producers and each plant to arrive at a rating which reflects the extent to which the state is applying and enforcing the PMO and its attendant regulations. To assure the accuracy of these ratings, and further to determine if standards are maintained between surveys, the U.S.P.H.S.

itself conducts an audit survey at least once during the rating period. Only if the audit survey results are within five points of the state survey results is the state work accepted. If the U.S.P.H.S. surveys reveals a ten point deviation with a score below 85, the shipper is immediately withdrawn from the IMS rating pamphlet.

As a result of the state survey and the audit survey, a rating is made for each milk plant shipping milk in interstate commerce. That rating is published quarterly in "Sanitation Compliance And Enforcement Ratings Of Interstate Milk Shippers" (PX 37, A-C, PX 56). The United States Government officially takes the position that the milk of those plants receiving a rating of 90% or better is wholesome and fit for human consumption.

9. The evidence establishes that Dixie has at all times relevant to this lawsuit received IMS ratings for its plant and producers in excess of 90% (PX 37, A-C, PX 38, PX 56). Indeed, its latest ratings, resulting from a survey conducted only four days before trial, show farm ratings of 91% and a plant rating of 96%.

10. In addition to inspection by Indiana and U.S.P.H.S. authorities, Dixie also conducts daily inspections of its own milk. Mr. Eskilson testified that Dixie maintains a fully staffed and equipped laboratory certified by the Indiana State Board of Health. Each day five basic tests are run on Dixie's finished products. Once a month each producer's raw milk is thoroughly examined. Results are reviewed by the Indiana authorities.

11. In addition to reliance upon Indiana and U.S.P.H.S. inspection a receiving jurisdiction, such as Chicago, has

the right to sample milk products from the delivery truck and immediately request a re-survey should it believe that the published survey results are inaccurate. Moreover, a receiving jurisdiction always has the power to refuse to accept any milk which it believes constitutes a health hazard to its citizenry.

12. Dixie's milk was and is wholesome and Chicago can rely upon Indiana and U.S.P.H.S. inspection to fully protect Chicago's health interests.

13. On the basis of the evidence and testimony before the Court, the Court finds that Dixie's milk is wholesome and that the standards and procedures adopted and enforced by the Indiana State Board of Health and the U.S.P.H.S. are sufficient to fully and adequately protect Chicago's health interests. The PMO standards and procedures have been adopted by 45 states and 1,400 municipalities, including the States of Illinois, Indiana, Wisconsin, Michigan, Minnesota and Ohio, which produce the bulk of the nation's milk. Chicago introduced no evidence whatsoever to indicate that the Indiana and U.S.P.H.S. inspection program is in any way inadequate. Indeed, the evidence establishes that the Chicago Board of Health has adopted, as a matter of practice, the PMO standards and has urged the Chicago City Council to formally enact those standards into law. Mr. King, Assistant Commissioner of Health of the City of Chicago, testified before the Health Committee of the Chicago City Council that adoption by the City of Chicago of an ordinance essentially identical to the PMO would fully protect Chicago's health interest (PX 20). Mr. Meany, Chief Sanitarian for the Chicago Board of Health, testified similarly and concluded:

> "The proposed revision of Chapter 154, presents an updated, modern standard which will provide a safe high quality product, for all of the people of Chicago, as well as permit the sale, in areas outside the state, of milk produced or processed under supervision of the Board of Health."

Mr. Meany further testified that Chicago could safely rely on a shipping state's inspection of milk stating:

> "The new section recognizes reciprocity between Chicago and other states and would permit the sale and distribution, in Chicago, of milk and milk products produced and processed under regulations substantially equivalent to this ordinance. . . ."

The foregoing testimony was not even attempted to be disputed and the Court finds the same to be true. The conclusion that Chicago's health interests are adequately protected by Indiana and U.S.P.H.S. inspections is reinforced by the fact that the United States Government officially takes the position that milk of those plants receiving a rating of 90% is wholesome and fit for human consumption. Federal agencies rely on the IMS ratings as an acceptable source of milk supply for interstate carriers as well as their own use. The U.S.P.H.S. states with respect to a receiving state's reliance upon a shipping state's inspection as follows (PX 39, p. 15):

> "A milk sanitation compliance and enforcement rating of 90 percent or more, determined by the methods described, means that the pasteurized milk and milk products sold in a community are as safe as reasonably strict enforcement of milk sanitation regulations will make them. Consumers of such grade A pasteurized

milk and milk products may, for all practical purposes, ignore the danger from milkborne disease as much as is possible and may therefore use such products with confidence."

14. Despite the fact that Chicago's health interests are adequately protected by Indiana and U.S.P.H.S. inspections, Chicago insists upon its right to make initial and continuing on-site inspections of Dixie's plant and producer sources as a condition to granting a permit to sell Grade A milk and milk products within the city limits.

15. Chicago's insistence upon making duplicative inspections is unnecessary and unrelated to any legitimate health interests.

16. The insistence by the City of Chicago upon unnecessary duplicative inspection may cause producers serving Dixie to refuse to sell to Dixie. Mr. Kjos, a former Dixie fieldman now serving Dixie farms for AMPI, testified that in his opinion "the majority" of Dixie's producers would seek another market rather than submit to such duplicative inspections. Mr. Eskilson testified that it was unreasonable and a hardship for the producers to be subjected to varying interpretations of the same standards by two different inspection authorities. In this connection Mr. Kimball testified that on the joint inspection of Dixie's producers made by the Indiana and Chicago health authorities, the Chicago inspectors "gigged" certain producers for items of cleanliness (e.g. short lengths of plastic hose, wash tubs, etc.), which were without health significance.

17. The evidence established that Chicago's insistence upon conducting on-site inspections as a condition to the

grant of a permit has discouraged out-of-state processors from pursuing applications for Grade A permits. Not one out-of-state processor holds a Chicago Board of Health permit. Mr. Meany testified that while 25-40 inquiries are received from out-of-state processors each year, when told that the grant of a permit is conditioned upon Chicago Board of Health initial and continuing inspections, "very few" follow through. None have been granted such a permit.

The evidence further discloses that a number of out-of-state processors have sought a permit to sell Grade A products in Chicago on the basis of their IMS ratings of 90 or higher, the same as Dixie. These include applications by Kroger for its Livonia, Michigan, plant to supply ice cream to the Kroger stores in the Chicago market (PX 54B), Sealtest for its Milwaukee, Wisconsin, plant (PX 54C), Ryan Milk Company for its Murray, Kentucky, plant to supply half and half coffee creamers (PX 54D), Yogurt Master for its Jacksonville, Florida, plant to supply yogurt, sour cream and dips (PX 54E), Yami Yogurt for its Fort Worth, Texas, plant to supply yogurt (PX 54F), Chautauqua Malted Milk for its Mayville, New York, plant to supply condensed skim to Borden's Chicago plant (PX 54G). All applicants had IMS compliance and enforcement ratings of 90% or higher. Yogurt Master had a plant rating of 99% and a producer rating of 94%. Yammie Yogurt had a plant rating of 95% and a producer rating of 97%. When advised that a permit could only be issued on the basis of Chicago inspection of producer sources and the shipper's plant, the inquiries terminated.

18. The evidence further establishes that Chicago's refusal to allow out-of-state processors permits to sell in Chicago has resulted in threatened interruption of the flow of milk from Chicago processors to other states. Both the State of Indiana and the City of Milwaukee enacted laws aimed solely at Chicago which would have prohibited Chicago processors from selling in Indiana and Milwaukee their milk until Chicago permits processors from those localities to sell in the City. Only after protracted and expensive litigation were Chicago processors able to secure a ruling that such laws were unconstitutional.

19. Dixie's experience establishes that Chicago's policy, here under attack, results in substantial delays before the Chicago Board of Health acts with respect to a permit application. In 1955 Dixie completed over 400 application forms which it submitted to the Chicago Board of Health. After a delay of several months the forms were simply sent back to Dixie without comment and without any further action being taken. Similarly, in 1969 when Dixie applied for a permit on the basis of its IMS ratings, Dixie's representative, Mr. Anderson, was told by Mr. Meany that it would be "futile" to apply at that time, but that Chicago was in the process of amending its milk ordinance to permit milk to come in on the basis of the shipping state's inspection as provided in the PMO. Similar advice was given by Chicago Commissioner, Dr. Murray C. Brown, to Indiana Health Commissioner Offutt in August, 1970 (PX 12, 13). The proposed amendment has been under advisement by the Health Committee of the Chicago Council since May, 1970, although the Chicago Board of Health testified in favor of its adoption. The Committee minutes disclose

that the only opposition was that of representatives of Locals 753 (Milk Drivers) and 754 (Inside Dairy Workers) on the ground that adoption of the reciprocal inspection provisions would have "harmful effects" on union employees (PX 18). Only after the filing of this action did Chicago offer to grant Dixie a permit, and then only on the basis of initial and continuing inspection by Chicago inspectors.

20. The foregoing establishes that Chicago's policy of insisting on continuing on-site inspections of plants and producer sources already subject to inspection by another jurisdiction has burdened commerce in milk and milk products.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and the parties and venue is properly laid in this district.

2. The action of the Chicago Board of Health in refusing to grant Dixie Dairy a permit, except upon initial and continuing inspection by Chicago Board of Health authorities, constitutes an impermissible burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution, in that:

A. Chicago has no legitimate health interest in inspecting Dixie's milk since all such interests are fully and adequately protected by Indiana and U.S.P.H.S. inspections of that milk. Since Chicago has no legitimate health interest in inspecting Dixie's milk, it therefore has no police power to regulate articles of commerce and such regulation is impermissible.

(Appendix A)

B. The policy of insisting upon unnecessary duplicative inspection has burdened interstate commerce in milk and milk products in that it has, (1) kept Dixie's wholesome milk out of the City of Chicago, (2) denied Dixie and other out-of-state processors the right to sell wholesome milk and milk products in the City of Chicago, and (3) threatened an interruption of the flow of milk from the City of Chicago to adjoining states.

3. Chicago's policy of refusing to grant Dixie a permit except upon its own inspection is unconstitutional.

4. Plaintiff is entitled to an award of its costs of suit.

Entered:

/s/ J. Sam Perry, Judge

Dated: Sept. 3, 1975

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIXIE DAIRY COMPANY, a corporation,
Plaintiff,
vs.
THE CITY OF CHICAGO, a municipal corporation, et al.,
Defendants.
No. 70 C 3212

DECREE

This cause came on for trial without a jury and the trial and final argument of counsel having been completed the court has on this date entered findings of fact and conclusions of law.

Now therefore in pursuance of said findings of fact and conclusions of law it is ORDERED, ADJUDGED and DECREED that the policy the City of Chicago, Illinois has heretofore followed of refusing to grant the Dixie Dairy Company, an Indiana corporation, a permit to sell milk in the City of Chicago without inspection by the City of Chicago in addition to inspection by the Indiana State Board of Health be, and it is hereby declared to be an unlawful burden upon interstate commerce and in violation of the interstate commerce clause of the constitution of the United States.

(Appendix B)

It is therefore, ORDERED, ADJUDGED and DECREED that the City of Chicago forthwith abolish said policy and that the City of Chicago issue plaintiff Dixie Dairy Company a permit to distribute Grade A milk and milk products in the City of Chicago and continue such permit in full force and effect in the same manner as it does to milk producers whose milk it inspects so long as Dixie Dairy Company enjoys an IMS rating of ninety percent (90%) or better.

Enter:

/s/ J. Sam Perry, Judge

Dated: September 3, 1975

APPENDIX C

(FINDINGS OF FACT AND CONCLUSIONS OF LAW PROFFERED BY DEFENDANTS.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DIXIE DAIRY COMPANY, a corporation,
Plaintiff,
vs.
THE CITY OF CHICAGO, a municipal corporation, et al.,
Defendants.
No. 70 C 3212

FINDINGS OF FACT

1. The Court has jurisdiction under 28 United States Code, Sec. 2201 and Article I, Section 8, of the Constitution of the United States (commonly known as the Commerce Clause).

2. Plaintiff, Dixie Dairy Company is an Illinois Corporation engaged in the business of purchasing, distributing and selling, Grade A milk and milk products processed at its plant in Gary, Indiana.

3. Dixie Dairy is the holder of an Indiana license and an Illinois Department of Public Health Permit to distribute Grade A milk and milk products within the State of Indiana and Illinois.

4. Dixie Dairy sells and distributes Grade A milk and milk products to communities within the State of Illinois that borders on and are contiguous to the City of Chicago.

(Appendix C)

5. That the 260 producers (farms) shipping milk to Dixie Dairy in 1972, were roughly located from O'Hare Field South to Kankakee, Illinois; East to Rensselaer, Indiana, and North to Michigan City, Indiana, or approximately within a sixty-five mile radius from the City of Chicago.

6. Of these approximately 50% were in Illinois and 50% in Indiana.

7. That Dixie Dairy and its producers are subject to routine inspection by the State of Indiana.

8. The Federal Government does not regulate the production or distribution of Grade A milk and milk products.

9. The Federal Government through the United States Public Health Service has promulgated a *recommended* ordinance entitled Grade A Pasteurized Milk Ordinance 1965 Recommendations of the United States Public Health Service.

10. The State of Indiana by Statute and regulation has substantially adopted and enforces the Recommended Ordinance.

11. The defendants are the City of Chicago a municipal corporation; the City of Chicago Board of Health, which agency is charged with the enforcement of the Ordinances of the City of Chicago, the State Statutes and Regulations relating to the regulation of the production and pasteurization of milk and milk products and with the issuance of permits to dairies, milk product plants, receiving stations and producers (farms) distributing and selling milk within the corporate limits of the City of Chicago.

(Appendix C)

Dr. Murray Brown, the Commissioner of Health, Dr. Eric Oldberg, Mr. Samuel A. Goldsmith, Mr. Walter Mullady, Dr. Lee Strohl, Dr. Robert Stepto, Mr. Edward F. Brabec, Dr. Mary Kelly Mullane and Dr. Leroy P. Levitt, individual members of the Chicago Board of Health.

12. The State of Illinois has substantially adopted the 1965 Model Ordinance by Statute and regulation.

13. The City of Chicago regulates and inspects dairies, milk plants, receiving stations and producers in accordance with the provisions of the 1965 Model Ordinance as adopted by Illinois State Statute and Regulation.

14. The State of Indiana by Statute and Illinois by Regulation provide that Grade A milk and milk products from points beyond the limits of routine inspection may be sold and distributed in their respective states and issue permits to do so when the milk or milk products are produced, processed and pasteurized under regulations substantially equivalent to those of the receiving state, i.e. recommended Ordinance and the shipper has been accorded a milk sanitation compliance and enforcement rating of 90% or higher as published in the Interstate Milk Shippers quarterly publication.

15. Indiana routinely inspects producers in Michigan, Illinois and Ohio.

16. Plaintiff Dixie Dairy refuses to accept under any condition a permit to sell and distribute Grade A milk and milk products in the City of Chicago which is conditioned on Chicago Board of Health initial and routine inspection of the plant and producers though there are no costs or charges to its plant or producers.

(Appendix C)

17. The City of Chicago refuses pursuant to its ordinance and policy to grant a permit to Dixie Dairy and its producers solely on a reciprocal basis and insists on routinely inspecting Dixie Dairies plant and producers without charge or cost to Dixie or its producers.

18. Dixie insists that the City of Chicago grant it a permit on a reciprocal basis because the State of Indiana has substantially adopted and enforces the 1965 Model Ordinance, because it is routinely inspected by Indiana State inspectors and because it has consistently received 90% or higher sanitation compliance and enforcement rating which is published in the Interstate Milk Shippers Quarterly publication.

19. The sole method by which the City of Chicago can determine if in fact Dixie Dairy and its producers are complying with the regulation of the 1965 Model Ordinance, and that the State of Indiana is properly enforcing the regulations is by the rating published in the Interstate Milk Shippers Quarterly publication.

20. The rating is a statistical sampling of a given number of producers (farms) to determine what the overall sanitation picture of the producers is.

21. The rating is generally made every two years by a state inspector (sanitation officer) certified by the United States Public Health Service.

22. This certified rating officer is a state inspector and can be involved in the routine inspections of his state agency. Though the certified rating officer cannot rate his own routine inspections he can and does rate the routine inspections of other inspectors working for the same agency.

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23. To determine the rating, for example, if a dairy has between 148 and 167 farms shipping to it, the certified rating officer would pick 36 farms at random and make an inspection of each one and debit the individual farms for violations found therein according to a point system devised in Methods of Making Sanitation Ratings of Milksheds 1966 Edition.

24. This is a weighted average, so that a large producer hauling 10,000 pounds of milk will have ten times the weight in the rating of a producer hauling 1,000 pounds of milk.

25. This procedure could grant a 90% or more quality and enforcement rating for all producers and be based on a relative small number of large producers, while all the other producers could actually be far below 90% minimum acceptance rating.

26. Neither the certified rating officer nor the United States Public Health Service have any enforcement power or authority.

27. The certified rating officer even when observing blatant and serious violations can only report those violations to the local agency and it is the local agency's responsibility to see that it is corrected.

28. There is no follow-up by the United States Public Health Service in regard to the violations, nor is the local agency required to report whether it did in fact see to it that the violation was corrected.

29. It is not uncommon to find violations of such a nature as would indicate that a permit should not have been

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issued originally but was issued because of misinterpretations.

30. It has been the practice of the Regional Office of the United States Board of Health to waive and not debit even serious violations contained in the 1965 Model Ordinance in regard to a particular local agency without apparent authority to do so and without notification to other agencies who may be receiving or contemplating receiving the milk and milk products from the particular agency.

31. If an audit survey by the Regional Office of the United States Board of Health finds that the rating obtained from the audit differs from that obtained by the certified rating officer in that it is below 90% and five points below the listed rating, they would notify the local agency that they had 60 days to re-evaluate the milk supply and give them a valid rating. If the local agency after 60 days makes a re-evaluation and the rating is 90% or better, this is accepted at face value, there is no new audit made to determine if the second rating has any more validity than the original.

32. Audits are made at a minimum of every five years.

33. Indiana inspectors and rating officers did not mark as violations drinking cups (submerged inlets) even though they testified these were a violation of the recommended code because of an oral dispensation granted Indiana by the Regional Office of the Public Health Service. They also did not mark as violations buried Seals because of some directive or other received from the Regional Office. Buried Seals are a violation of the recommended code.

34. Drinking Cups and Buried Seals come under the heading of Water Supply, and on a scale of debit points

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of 1, 2, 3, 5 and 10, in any rating, they are 5 point debits (Methods of Making Sanitation Rating of Milksheds 1966 Edition, P. X 39).

35. The City of Chicago has the economic means and manpower to routinely inspect Dixie Dairy and its producers.

36. Defendant has failed to prove that the City of Chicago has refused to grant a permit to sell and distribute Grade A milk and milk products by out of state shippers because it does not have the economic means and manpower to initially and routinely inspect the shipper or its producers.

37. Plaintiff's own testimony reveals that the City of Chicago inspections and requirements are not arbitrary or capricious.

38. There is no testimony or credible evidence that the Chicago Board of Health by its administration of Chicago's Milk Ordinance and the recommended code has discouraged out-of-state milk producers and processors from applying for permits to sell Grade A milk and milk products in the City of Chicago.

39. There is no testimony or evidence that the Chicago Board of Health does not speedily and fairly inspect out-of-state milk producers and processors without charge.

40. The Chicago Board of Health, upon notification by the out-of-state shipper that it and its producers are ready for the initial inspection, will immediately inspect the producer and its processors.

41. The Chicago Board of Health upon request will without charge send inspectors to sample some of the pro-

ducers and advise the shipper what improvements and corrections should be made so as to pass the initial inspection.

42. The City of Chicago's Ordinance and policy requiring initial and routine inspections by Chicago Board of Health inspectors as condition precedent and subsequent to the issuance of a permit to sell Grade A milk and milk products in the City of Chicago is a reasonable enactment and means to protect the health and safety of its citizens.

43. The City of Chicago's Ordinance and policy requiring initial and routine inspections by Chicago Board of Health inspectors before issuing a permit to sell Grade A milk and milk products regulates evenhandedly to effectuate a legitimate local public interest.

44. PX 3 in the Forward to the Grade A Pasteurized Milk Ordinance 1965 Recommendations of the United States Public Health Service, states the following:

> "Despite the progress that has been made, occasional milkborne outbreaks of illness still occur, emphasizing the need for continued vigilance at every state of production, processing, pasteurization, and distribution of milk and milk products."

45. There is no testimony or evidence that the Chicago Board of Health inspection of Dixie Dairy or its producers caused any disruptions in the operation of the plant or the farms.

46. There is no testimony or evidence that a dual inspection creates any disruptions in the operations of the Dairies or farms.

47. The City of Chicago's inspectional requirements has no impact on interstate commerce other than a psychological reluctance by shippers and producers to submit themselves to dual inspections.

48. Where the receiving jurisdiction cannot routinely inspect the dairy and producers of the shipper for lack of economic feasibility or resources the conditions set out in the reciprocity provisions of the recommended ordinance under the circumstances adequately protect the health, safety and welfare of the receiving jurisdiction.

CONCLUSION OF LAW

The Court has jurisdiction of the subject matter and the parties.

The City of Chicago Board of Health is mandated by Chapter 56½ Food and Drug Act, Sec. 220 Illinois Revised Statutes 1969 and the Municipal Code of the City of Chicago, Chapter 9, sec. 9-11(a) and (b) to enforce, in addition to the City's Ordinances and Board of Health Regulations, the Statutes and Regulations of the State of Illinois as minimum requirements for milk and milk products.

There are no state statutory limits placed on the City of Chicago's right to inspect plants, receiving stations and producers shipping milk and milk products for sale and distribution in the City of Chicago. *Dixie Dairy* v. *City of Chicago,* 355 F. Supp. 1351.

The regulation of milk and milk products which originate from remote areas is in the interest of the safety, health and welfare of local communities. *Parker* v. *Brown,*

317 U.S. 341 (1943); *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

Where Congress has not spoken to the contrary, a state or local government may, under certain conditions, regulate milk even though interstate commerce may be affected. *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346 (1939); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935).

The necessity, importance and responsibility for the regulation and inspection of milk and milk products have long been recognized. *Koy* v. *City of Chicago*, 263 Ill. 122 (1914); *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

The City of Chicago's inspectional requirements for the issuance of a permit to sell and distribute Grade A milk and milk products in the City of Chicago is a viable constitutional alternative to the method sought to be imposed by Dixie Dairy, rather than an unreasonable restraint of trade or violation of the Interstate Commerce Clause. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

The City of Chicago's inspectional requirements and the Board of Health's administration thereof without charge or fee have no demonstrable effect on interstate commerce and where no effect is found, no further inquiry need take place, and the practice is not violative of the Commerce Clause of the Constitution. *Procter and Gamble Co.* v. *City of Chicago*, 509 F. 2d 69-75 (1975).

The question whether direct inspection and supervision of dairies and their producers as opposed to indirect in-

spection and supervision through reliance on a non-enforcement agency's statistical overview better protects health, is essentially a matter of public policy. Public policy can, under our Constitutional system, be fixed only by the people acting through their elected representatives. It is beyond the limited authority of the Court to review this legislation under the Commerce Clause. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago Rock Island & Pacific Railroad Co.*, 393 U.S. 129-136.

Where the burden on interstate commerce is slight, and the area or legislation is one that is properly of local concern, the means chosen to accomplish this end should be deemed reasonably effective where the contrary has not been demonstrated by clear and convincing proof. *Procter and Gamble Co.* v. *City of Chicago*, 509 F. 2d 69-76.

Courts will not look behind stated legislative purpose to find hidden intentions or motives. *Wilderness Society* v. *Morton*, 479 F. 2d 842 (CA D.C. 1973).

Nor can the Court use the Due Process Clause of the Fourteenth Amendment to strike down state or local laws, regulating business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955); *Olson* v. *Nebraska*, 313 U.S. 236 (1941); *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963); *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973).

Even if the test applied is a balancing of the legitimate health interest served through evenhanded regulation by the City of Chicago inspectional requirements as against the

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non-existent or, at most, slight effect on interstate commerce, the Ordinance and policy must be upheld as not violative of the Commerce Clause of the United States Constitution. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137.

The City of Chicago's Ordinance and policy refusing to grant Dixie Dairy a permit except upon the City's own inspection requirements is constitutional and not violative of the Commerce Clause of the United States Constitution nor the Due Process Clause of the Fourteenth Amendment.

Judgment is had for the Defendants and against the Plaintiff.

Enter:

.....

Judge Samuel Perry

Dated: .....

APPENDIX D

In the

United States Court of Appeals

For the Seventh Circuit

No. 75-1932

DIXIE DAIRY COMPANY, a corporation,

Plaintiff-Appellee,

v.

CITY OF CHICAGO, a municipal corporation, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division — No. 70 C 3212
J. SAM PERRY, *Judge.*

ARGUED JANUARY 19, 1976 — DECIDED AUGUST 6, 1976

Before SWYGERT, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* The issue in this case is whether a Chicago milk inspection ordinance imposes an unreasonable burden on interstate commerce, thereby violating the Commerce Clause, article I, section 8, of the Constitution. The District Court, after trial, entered a judgment holding the ordinance unconstitutional. We affirm that judgment.

Plaintiff Dixie Dairy Company operates a milk processing plant in Gary, Indiana, and sells the milk and milk products processed there to buyers in Indiana and Illinois. Dixie purchases its milk from 204 dairy farms, of which about half are in Illinois and half in Indiana.

In 1955 Dixie applied for a permit to sell milk in the City of Chicago. Forms were submitted on behalf of all

of Dixie's producers and milk haulers, but no action was taken by the city. The company next inquired about the possibility of obtaining a permit in May of 1969. A Dixie representative was informed at that time by the city's chief sanitary officer that the city was in the process of updating its milk inspection ordinance, and that it would be "futile" to apply then.

Two years before Dixie's most recent inquiry, the State of Indiana enacted the Grade "A" Pasteurized Milk Ordinance (PMO) recommended by the United States Public Health Service (USPHS). Ind. Code § 16-6-6-1, *et seq.* (Burns Stat. 1973). The PMO has been voluntarily adopted by 45 states and many counties and municipalities in the United States. The Indiana statute embodying the ordinance requires all vendors of milk within the state to obtain a permit from the Indiana State Board of Health. As a condition to obtaining and maintaining a permit, a distributor's processing plant, such as Dixie's, and all farms shipping milk to that plant are subject to inspection at least twice a year by the Indiana health authorities. Ind. Code §§ 16-6-6-3, -5. The District Court found that farms are actually inspected by the state three or four times a year, and that plants are inspected every week. In addition, the statute requires that each dairy farmer's milk be laboratory tested for bacteria a minimum of four times every six months. Ind. Code § 16-6-6-6. Bulk milk haulers, who transport milk from the farms to the processing plants, are also inspected three times a year, according to the District Court.

State rating officers certified by USPHS survey and rate milk producers and processors in every state which has adopted the PMO pursuant to the procedures and criteria set forth in a pamphlet entitled "Methods of Making Sanitation Ratings of Milksheds," USPHS Publication No. 678 (1966). Compliance with those criteria is determined according to a point system, with any compliance rating above 90 per cent being considered acceptable for interstate transport and consumption. Dixie's farmer suppliers are thus subject to two further inspections, one by USPHS-certified state rating officers, who inspect a random sample of each processor's farms to derive the USPHS rating, and another by USPHS agents, who check the results of the survey for accuracy on a sample selection basis. Processing plants are also surveyed by state survey officers, whose results are audited by USPHS.

Section 11 of the PMO, adopted in substance as Ind. Code § 16-6-6-11, provides that milk "from points beyond the limits of routine inspection" may be sold within the enacting authority's jurisdiction if the milk has been produced and pasteurized under regulations substantially equivalent to the PMO and has been awarded an acceptable rating by a state milk sanitation rating officer certified by USPHS.[1] Thus duplicative inspections are avoided.

The State of Illinois, by regulation, has also adopted the PMO, including section 11. Ill. Dep't of Pub. Health, Grade A Pasteurized Milk and Milk Products Rules and Regulations, art. XI, rule 11.01. Dixie has a permit, issued pursuant to these regulations, to sell milk in Illinois. That permit, however, does not authorize Dixie to sell in Chicago, which, under the authority of Ill. Rev. Stat. ch. 24, § 11-16-1 (1975), maintains its own milk regulations and has not adopted the PMO.[2] Since 1934 the Chicago milk ordinance has required that all milk vendors obtain a permit from the Chicago Board of Health and that they and their suppliers submit to periodic inspections by the board's own inspectors. Chicago Municipal Code §§ 154-8, -17, -22. Because no effective provision is made for reliance upon inspections by out-of-state authorities,[3] an out-of-state processor seeking a Chicago permit is in effect

[1] Section 11 of the statute, unlike section 11 of the PMO, also contains a reciprocity proviso, which was held unconstitutional by a three-judge district court in *Dean Foods Co. v. State Board of Health of the State of Indiana*, No. IP 70-C-610 (S.D. Ind. July 7, 1971).

[2] The District Court found, however, that while the PMO has not been enacted by the Chicago City Council, PMO inspection standards have been adopted informally by the Chicago Board of Health.

[3] Section 154-19 of the Code provides:

> *"Products shipped from beyond limits.* Milk and milk products from points beyond the limits of inspection may not be sold in the city unless produced and pasteurized under provisions identical with those of this chapter and approved by the board of health. In order that inspections by the board of health may be adequate, thorough, and effective, the board of health may confine its inspections within such points and territorial limits as the board of health may, from time to time, deem necessary to insure economic and proper supervision, and to safeguard and promote the public health of the city."

Trial testimony revealed, however, that Dixie and all of its suppliers are considered by Chicago authorities to be within the "limits of inspection." The Board of Health has interpreted section 154-19 as applying only to emergency situations.

required by the ordinance to submit itself and its dairy farmer suppliers to duplicative inspections by Chicago inspectors.

The record is silent on the question of whether Illinois processors who wish to sell milk both in Chicago and elsewhere in Illinois are, with their suppliers, subjected to duplicative inspections. At oral argument the question was disputed by assertions outside the record, which we must of course disregard. It would seem incongruous and unlikely that Illinois which, by adopting section 11 of the PMO, accepts inspections made by other states, would not do the same for Chicago, to whose inspectors it has entrusted the health of Chicago's 3.4 million people.[4] We shall, however, treat this point as unresolved by the record.

Dixie brought this suit in 1970, alleging in count 1 of its amended complaint that the city's refusal to issue a permit in the face of Indiana inspections and of the company's high USPHS ratings imposed an unconstitutional burden on interstate commerce. In count 2 Dixie alleged that the inspection and permit policy discriminated against interstate commerce, since the city refused not only to issue the permit but also to take the prerequisite step of inspecting Dixie's facilities. The city moved for summary judgment, which was granted as to count 1, in March 1973. While the suit was pending, Chicago Board of Health inspectors twice inspected Dixie's plant and producer farms. After the second inspection tour, the city offered to issue a permit on the condition that it be entitled to make continuing inspections, at no charge to Dixie or its producers. As a result of this offer, the District Court granted the city's motion as to count 2 in June 1974. Dixie, adhering to its view that duplicative Chicago inspections were unnecessary, rejected the offer and appealed the count 1 ruling. This court reversed in an unpub-

[4] It is noteworthy, in this connection, that while, as we point out later in the text, no out-of-state milk processors hold Chicago permits, a number of Illinois processors have held permits for many years and at least one other has applied for and received a permit in the past two years. This is some indication that Illinois processors are not subjected, with their suppliers, to duplicative inspections, assuming that, as the District Court found, requiring duplicative inspections discourages processors from applying for Chicago permits.

lished order and sent the case back to the District Court for resolution of disputed factual issues.[5]

On remand, the District Court found that at all times relevant to this action Dixie has received USPHS ratings of above 90 per cent for its plant and producers, that Dixie's milk is wholesome, and that "Chicago can rely upon Indiana and USPHS inspection to fully protect Chicago's health interests." The court noted that city officials had acknowledged as much, and the city had not contended otherwise. The court also found, in findings discussed in greater detail below, that the result of the duplicative inspection requirement of the ordinance was that no out-of-state processor has obtained a Chicago milk permit, and this result constituted an unreasonable burden on interstate commerce.[6] It therefore concluded that the city's refusal to grant milk permits except when conditioned upon Chicago Board of Health inspections was unconstitutional.

I.

The count of the complaint in which discrimination against interstate commerce was alleged (count 2) having been dismissed and no appeal having been taken from that dismissal, the issue of discrimination was removed from the case and is not before us.[7] As we have noted, the record does not disclose whether Illinois processors and their

[5] Among the factual issues which this court found to be relevant were: "whether the Chicago Board of Health by its administration of Chicago's milk ordinance has discouraged out-of-state milk producers and processors from applying for permits to sell Grade A milk products in Chicago; whether the Chicago Board of Health speedily and fairly inspects out-of-state milk producers without charge; and whether shelf inspection of Grade A milk products would adequately protect the health of Chicago residents."

[6] An additional burden found by the District Court was the threat of retaliatory legislation by states and municipalities whose own producers are adversely affected. Since the only two instances of retaliatory legislation evidenced by the record have been found to be either unconstitutional, see *Dean Foods Co. v. State Board of Health of the State of Indiana*, *supra* note 1, No. IP 70-C-610, or contrary to state law, see *State ex rel. MTW, Inc. v. The City of Milwaukee*, No. 390-391 (Wis. Cir. Ct. Sept. 14, 1971), we attach no weight to this finding.

[7] Even if it were otherwise permissible to do so, therefore, we need not consider the city's motives for rejecting a 1969 proposal to empower the Board of Health to accept milk on a reciprocal basis, including Dixie's contention that the only opposition to the proposal came from labor unions which sought to protect jobs.

suppliers are also subjected to duplicative inspections as a result of the ordinance. We therefore assume the ordinance to be nondiscriminatory and must decide only whether "[t]his is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce." *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959).

Before the formulation of the balancing test in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and the reaffirmation of that test in *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 96 S.Ct. 923 (1976), the argument in favor of the constitutionality of the Chicago milk ordinance would have been more persuasive. The ordinance does not purport to discriminate against interstate commerce. *Cf. South Carolina Highway Department* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 189 (1938). The policy decision and legislative judgment underlying a state regulation designed to protect the public's health or safety are not subject to review by a federal court. *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & P. R. Co.*, 393 U.S. 129, 136, 138-139 (1968). The burden the ordinance lays on commerce is "incidental," see *e.g.*, *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 352 (1939), and not "direct," *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189, 199 (1925). The ordinance is not inconsistent with regulations of other states in a field in which uniformity is important to the national interest in unimpeded commerce. See *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 444, 448 (1960); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 770, 781-782 (1945). The added expense to interstate businesses of complying with the regulation would not justify a court in striking it down. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, R.I. & P. R. Co.*, *supra*, 393 U.S. at 139-140; *Bibb* v. *Navajo Freight Lines, Inc.*, *supra*, 359 U.S. at 529.

In *Pike* v. *Bruce Church, Inc.*, however, Justice Stewart, writing for a unanimous Court, stated the standard which is to control cases such as the one before us:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142.

That passage from *Pike* was quoted by Justice Brennan, also writing for a unanimous Court, in the recent *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, *supra*, 96 S.Ct. at 928. Justice Brennan introduced the quoted material with the following words:

> "[T]he Court, if it finds that a challenged exercise of local power serves to further a legitimate local interest but simultaneously burdens interstate commerce, is confronted with a problem of balance . . . ."

Neither *Pike* nor *Cottrell* purported to change the law in this field, but from their restatement and distillation of that law emerges a balancing test which, if not inconsistent with, is at least a considerable refinement of, the approaches taken in *Brotherhood* and other cases. We must, of course, apply the rule as most recently stated by the Court and appraise the earlier holdings accordingly. The *Pike* test applies by its terms to evenhanded, *i.e.*, nondiscriminatory, regulations. Also, it appears that the test is to be applied even when the regulation is in the field of health or safety. In stating the test, the *Pike* opinion cites the *Huron Cement* case, which involved an ordinance to protect health, and while a distinction is recognized in *Pike* between health and safety regulations and economic regulations, the importance of that distinction seems to lie in the relative weight to be given the state interest when balanced against the burden on commerce. See 397 U.S. at 142, 143-146. Our conclusion that we are to apply the *Pike* balancing test even though a health measure is involved, but giving appropriate addi-

tional weight to the fact that the regulation is health-related, is consistent with *Procter & Gamble Co.* v. *City of Chicago,* 509 F.2d 69 (7th Cir. 1975), in which we applied that test while recognizing the need to reconcile it with the *Brotherhood* case. Thus, while we are not to make legislative judgments concerning the need for, or efficacy of, a health regulation we may nevertheless consider whether the burden on commerce is excessive in relation to the benefits flowing from the regulation, and whether the health interest could be protected as well by alternative means that would burden commerce less.

One more paragraph about the governing precedents is necessary. In *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354-355 (1951), and again in *Cottrell* the Supreme Court said that an acceptable alternative means of protecting the state's public-health interest was to make its own inspection of milk sources outside the state.[8] In *Cottrell,* however, the reference to this alternative is qualified. Mississippi could make its own inspection, said the Court, "[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own . . . ." 96 S.Ct. at 930. Unless this qualification was surplusage, it means at least that if such assurance of substantial equivalence is present, the alternative of making its own inspection may not be available to the state authority. Whether it is available, we believe, depends on the results of applying the *Pike* balancing test, which *Cottrell* indorses.

II.

The burden imposed on interstate commerce by the Chicago milk ordinance lies in the duplicative on-site inspections to which both out-of-state dairies and their dairy-farmer suppliers are subjected. This burden might not appear to be excessive were it not for the evidence and findings showing that the actual effect of the duplicative inspection requirement has been that, with three arguable exceptions,[9] no out-of-state processors hold Chi-

[8] The *Dean Milk* opinion said the city could charge for these inspections, and this is repeated in *Cottrell.* 96 S.Ct. at 931. As noted above, Chicago offers to inspect at its own expense.

[9] Three out-of-state plants hold Chicago permits. Dixie characterizes them as "branch plants owned by Chicago dairies," to which the city responds that one of them, Borden, is a national company with only a regional office in Chicago.

cago Board of Health milk permits. The court found as follows:

> "Not one out-of-state processor holds a Chicago Board of Health permit. Mr. Meany [Chief Sanitarian for the Chicago Board of Health] testified that while 25-40 inquiries are received from out-of-state processors each year, when told that the grant of a permit is conditioned upon Chicago Board of Health initial and continuing inspections, 'very few' follow through. None have been granted such a permit."

The court also found that a number of other out-of-state processors, like plaintiff, had tried to secure permits without incurring the burden of duplicative on-site inspections. When it became clear that only through such inspections could a permit be received, these applicants gave up. The court said:

> "The evidence further discloses that a number of out-of-state processors have sought a permit to sell Grade A products in Chicago on the basis of their IMS [interstate milk shipper's] ratings of 90 or higher, the same as Dixie. These include applications by Kroger for its Livonia, Michigan, plant to supply ice cream to the Kroger stores in the Chicago market (PX 54B), Sealtest for its Milwaukee, Wisconsin, plant (PX 54C), Ryan Milk Company for its Murray, Kentucky, plant to supply half and half coffee creamers (PX 54D), Yogurt Master for its Jacksonville, Florida, plant to supply yogurt, sour cream and dips (PX 54E), Yami Yogurt for its Fort Worth, Texas, plant to supply yogurt (PX 54F), Chautauqua Malted Milk for its Mayville, New York, plant to supply condensed skim to Borden's Chicago plant (PX 54G). All applicants had IMS compliance and enforcement ratings of 90% or higher. Yogurt Master had a plant rating of 99% and a producer rating of 94%. Yami Yogurt had a plant rating of 95% and a producer rating of 97%. When advised that a permit could only be issued on the basis of Chicago inspection of producer sources and the shipper's plant, the inquiries terminated."

That the reason for the failure of out-of-state processors to obtain permits has been the duplicative inspection requirement of the Chicago ordinance is an in-

ference the District Court was entitled to draw, and the inference we ourselves would have drawn notwithstanding the paucity of direct evidence on this subject.[10] Dixie's president testified that he was afraid that many of Dixie's dairy farmer suppliers would seek other outlets for their milk rather than submit to duplicative inspections. There is no similar evidence concerning the many others who made inquiries but did not pursue them, except that in some instances their interest appears to have ended when they were informed of the inspection requirement.[11] Any evidence concerning whether the farmers would have taken the feared action would necessarily have been speculative. There is no testimony in the record from any farmer, and such evidence as there is on this subject is not very satisfactory.[12] It can reasonably be inferred, however, that, in view of the disastrous economic effect which failure to pass an inspection would have on a dairy farmer, he would much prefer to be subject to inspection by only one authority if he had a choice.

Out-of-state processors have not obtained Chicago permits, and therefore their milk has not entered the Chicago market. The District Court's finding that the reason for

---

[10] There was also evidence and a finding of delays in connection with the application process, but it does not relate to recent years and it relates only to Dixie.

[11] This observation is based on our examination of the correspondence between the city's chief sanitary officer, James Meany, and a number of applicants, which, in at least three instances, appears to have terminated after the applicants were informed of the inspection requirements. [Distron, Inc. (PX 54C), West Side Dairy (PX 54C), and Yami Yogurt (PX 54F).] In numerous other cases the final item of correspondence is a letter from Meany requesting the applicant to arrange a meeting with his department for the purposes of discussing Chicago Board of Health regulations.

[12] The District Court's finding that Chicago's insistence on making its own inspection "may cause producers serving Dixie to refuse to sell to Dixie" is apparently based on the testimony of two witnesses, Dixie's president and a "field man" who had worked for the company and who had been dealing with dairy farmers for some 25 years. The former testified that the additional inspections "might" cause farmers to sell their milk to competitors of Dixie instead of Dixie, although "I'm not saying it would happen, but it could happen." The field man testified that in his opinion, based on his conversation with "various producers," a majority of producers would find other outlets for their milk rather than submit to two inspections. A timely hearsay objection was interposed and overruled. The witness' testimony of a farmer's declaration as to his state of mind, offered only to prove that state of mind, was not excluded by the hearsay rule. Fed. R. Evid. 803(3). No other objection to the testimony was interposed.

this is the duplicative inspection requirement imposed by the Chicago ordinance is not clearly erroneous.

III.

Having considered the nature and extent of the burden on commerce, we turn to the factor to be balanced against that burden, *viz.*, the putative local benefits to be derived from the ordinance (*Pike, supra,* 397 U.S. at 142) and to the related question of whether the Indiana standards are substantially equivalent to Chicago's (*Cottrell, supra,* 96 S.Ct. at 930).

The District Court made detailed findings concerning the efficacy of the Indiana inspection program and the USPHS inspection and rating program:

> "12. Dixie's milk was and is wholesome and Chicago can rely upon Indiana and U.S.P.H.S. inspection to fully protect Chicago's health interests.
>
> "13. On the basis of the evidence and testimony before the Court, the Court finds that Dixie's milk is wholesome and that the standards and procedures adopted and enforced by the Indiana State Board of Health and the U.S.P.H.S. are sufficient to fully and adequately protect Chicago's health interests. . . . Chicago introduced no evidence whatsoever to indicate that the Indiana and U.S.P.H.S. inspection program is in any way inadequate. Indeed, the evidence establishes that the Chicago Board of Health has adopted, as a matter of practice, the PMO standards and has urged the Chicago City Council to formally enact those standards into law."

The court also noted and credited testimony by responsible city health officials before a committee of the City Council to the effect that adoption by the city of an ordinance substantially the same as the PMO and permitting distribution in Chicago of milk and milk products produced and processed under substantially equivalent regulations would fully protect Chicago's health interest. The city has not disclaimed or disputed that testimony and has not contended in the District Court or here that the Indiana standards are not substantially equivalent to

the Chicago standards[13] or that the Indiana inspections are not adequate.[14]

Thus, although the challenged ordinance is ostensibly designed to protect the public health, the record shows, and it is uncontroverted, that in fact the ordinance has no appreciable effect in promoting that interest. The public health goal of the ordinance has become little more than a fiction. Even giving *Brotherhood* the reading most favorable to the city, it does not require deference to a legislative judgment which is concededly without a substantial basis in fact. And applying the balancing test of *Pike* and *Cottrell*, "the burden imposed on . . . commerce is clearly excessive in relation to the putative local benefits," *Pike*, 397 U.S. at 142, which are rendered negligible by the conceded presence "of adequate assurance that the standards of a sister State . . . are substantially equivalent . . ." to Chicago's, *Cottrell*, 96 S.Ct. at 930.

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[13] See also note 2, *supra*.
During their inspection of Dixie's producer farms, the Chicago inspectors found fault with producers' use of clear plastic tubing to convey milk from milking equipment attached to the cow to a storage tank, if the tubing had become clouded. The Indiana inspectors did not. All agreed, however, that black plastic tubing would be acceptable. The Chicago inspectors also gave demerits if the producer's wash-and-rinse vats were not made of stainless steel; the Indiana inspectors viewed this requirement as too harsh. The Indiana inspectors also failed to assess demerits for cattle drinking cups which were fed by submerged inlets, although such devices are not permitted by the model ordinance. None of these minor variances between the practices of the Chicago inspectors and the Indiana inspectors were serious enough to disqualify any producer.

[14] The District Court also noted:
"In addition to reliance upon Indiana and U.S.P.H.S. inspection a receiving jurisdiction, such as Chicago, has the right to sample milk products from the delivery truck and immediately request a re-survey should it believe that the published survey results are inaccurate."

APPENDIX E

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 2, 1976

Before
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge

DIXIE DAIRY COMPANY, a corporation,
Plaintiff-Appellee,

No. 75-1932

vs.

CITY OF CHICAGO, a municipal corporation, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 70 C 3212

J. Sam Perry, Judge.

O R D E R

On consideration of the petition for rehearing with suggestions for rehearing in banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

NOTE: Judge Bauer disqualified himself from any participation in the matter.

APPENDIX F

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 15, 1976

Before

Hon. PHILIP W. TONE, Circuit Judge

Hon. _____

Hon. _____

DIXIE DAIRY COMPANY, a corporation,
Plaintiff-Appellee,

vs.

CITY OF CHICAGO, a municipal corporation, et al.,
Defendants-Appellants.

No. 75-1932

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn.

(70 C 3212)

This matter comes before the court on the "MOTION" and affidavit of counsel for the defendant-appellant, filed herein on September 13, 1976, requesting the stay or recall of this Court's mandate. In fact, the mandate of this Court was issued on September 10, 1976. On September 14, 1976 counsel for the plaintiff-appellee filed herein its "RESPONSE TO MOTION FOR RECALL OF MANDATE." Upon consideration of the foregoing, this Court being fully advised in the premises,

IT IS ORDERED that the previously issued mandate of this Court be, and the same is hereby, RECALLED and STAYED for a period of thirty (30) days from the date of this order pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

Supreme Court, U. S.
FILED
NOV 15 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-540

CITY OF CHICAGO, A MUNICIPAL CORPORATION, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, COMMISSIONER OF THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1976.

No. 76-540.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, COMMISSIONER OF THE CHICAGO BOARD OF HEALTH, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Respondent, Dixie Dairy Company, plaintiff in the district court, and appellee below, prays this Court not to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on August 6, 1976.

ISSUE PRESENTED FOR REVIEW.

Whether the City of Chicago may deny an Indiana dairy the opportunity to sell admittedly wholesome milk in Chicago by insisting on continuing, duplicative inspections of that dairy's plant and producer sources even though, as the trial court found, and the Court of Appeals affirmed, Chicago's health interests are fully and adequately protected by Indiana and United States Public Health Service inspection of that plant and those producers.

COUNTERSTATEMENT OF THE CASE.

Petitioners' statement of the case regrettably contains several important misstatements and omits other facts, thereby necessitating a counterstatement.

First, at page 8, Chicago states that its city ordinance requires that Chicago inspect all farms and milk plants, wherever located. Actually, Section 154-19 of the ordinance, quoted in the Petition, permits milk to be sold in the city if produced under provisions identical with the Chicago code and approved by the Board of Health. Testimony established, however, that the Board has interpreted Section 154-19 as applicable only in emergency situations. The Board of Health policy, and not the ordinance, requires Chicago inspection.

Second, the City's statement at page 12 of its brief that Dixie has not sought a City of Chicago permit since 1955 is patently false, as Judge Perry specifically found (Findings[1] 4 and 19, App. 2a and 12a). Indeed, the instant suit followed by less than a year the City's latest denial, in 1969, of a permit to Dixie. Dixie first applied for a milk permit in 1955 by submitting hundreds of application forms on its own behalf and on behalf of

1. Judge Perry's Finding of Facts are hereinafter referred to as "Findings ....," Appendix page references are to the Appendix contained in the City of Chicago's Petition for Writ of Certiorari, and are hereinafter referred to as "App. ....".

each of its producers to the Chicago Board of Health. Dixie was then informed that the forms had been changed, and it would have to reapply. Dixie did reapply, but Chicago simply took no action and returned the forms. Between 1955 and 1969 Dixie officers had several conversations with Board of Health personnel, but in each instance were discouraged from seeking a permit. In 1969, after Indiana had adopted the United States Public Health Service (U. S. P. H. S.) Model Milk Ordinance, Dixie again sought a permit. Dixie personnel met with Chicago officials and requested a permit based on Indiana and U. S. P. H. S. inspection of Dixie's milk. At that meeting, Mr. Meany, Chief Sanitarian for the Chicago Board of Health, told Dixie that its application would be "futile" because there was currently pending before a committee of the City Council a bill to permit reciprocal inspection and no action could be taken until passage of the bill. That bill remains in committee today.

Third, Chicago's statement of the case glosses over the fact that when Chicago sought court permission to inspect Dixie's plant and producers as a matter of discovery in the case, and as a result simultaneous Indiana and Chicago inspection was conducted, Chicago failed Dixie while Indiana did not. Regarding the validity of that inspection, Judge Tone could not resist observing that Chicago gave demerits to farms using clear plastic tubing which in places had become opaque because of scratches, but conceded under oath that the Chicago code permitted black rubber tubing under identical circumstances (App. 40a, n.13). Not until the eve of trial did Chicago again seek permission to inspect and it then passed Dixie in an obvious attempt to moot the lawsuit. Dixie refused the proffered permit because it would be conditioned upon Chicago's right to conduct continuing duplicative inspections.

Fourth, Chicago would have the Court believe that the discrimination issue was mooted by Chicago's offer of a permit. While it is true that after the offer of a permit Dixie could no longer allege it was the victim of discrimination, nevertheless,

both the trial and appellate courts concluded that the evidence supported Dixie's assertion that Chicago's insistence on initial and continuing on-site inspections was utilized as a device to exclude all out-of-state milk processors (Finding 17, App. 10a; Seventh Circuit Opinion, App. 36a-37a). These findings were among those which led the court to hold that Chicago's policy constituted an impermissible burden on commerce.

Finally, the last several pages of Chicago's statement attempts to establish that the additional inspection conducted by the City of Chicago Board of Health better insures the safety of the milk to Chicago residents. Both Judge Perry, and Judge Tone on appeal, found this allegation to be totally unwarranted (Finding 12, App. 8a; Seventh Circuit Opinion, App. 40a, n.13).

REASONS FOR DENYING THE WRIT.

I.

The Opinion of the Court of Appeals Is Entirely Consistent with Dean v. Madison as Well as A & P v. Cottrell.

Judge Tone's well reasoned opinion thoroughly discusses *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366 (1976), *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970), and *Dean Milk Company* v. *City of Madison, Wisconsin*, 340 U. S. 349 (1951), and their relationship to the instant facts. Respondent adopts that discussion.

Initially, it is important to recognize that Judge Perry found, and the Seventh Circuit concurred, that Chicago's legitimate health interests with respect to Dixie's milk are fully protected by Indiana and U. S. P. H. S. inspection. Therefore, the City's insistence upon its own inspection as a condition to grant of a permit constitutes regulation without any health justification, and thus burdens commerce. *Hood* v. *DuMond*, 336 U. S. 525 (1949); *Milk Control Bd.* v. *Eisenberg Co.*, 306 U. S. 346 (1938). Even if Chicago had managed to establish that it had

some legitimate health interest in inspecting Dixie's milk, the method chosen, duplicative inspection, would still run afoul of the commerce clause. The law is clear that in exercising its power to protect health interests, a state or municipality must choose that reasonable alternative method of regulation which least burdens commerce. *Dean Milk Company* v. *City of Madison, Wisconsin, et al.*, 340 U. S. 349 (1951); *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970). In *Pike* this Court discussed the relation between the commerce clause and the reasonable, less burdensome alternative regulation rule. The Court there held that the alternative method of protecting local health interests which has *the least impact on interstate activities* is the method which must be employed. Thus, at 397 U. S. 134, 142 the Court stated:

> "If a legitimate local purpose is found, then the question becomes one of degree. And *the extent of the burden that will be tolerated will of course depend* on the nature of local interest involved, and *on whether it could be promoted as well with a lesser impact on interstate activities.*" (Emphasis supplied.)

The constitutional principle which emerges from *Pike* is clear. While a city admittedly is empowered to protect its legitimate local health interests, it may not do so in any manner it chooses, but rather must employ that means of promoting local health interests which has the "lesser impact on interstate activities."

In terms of *Pike*, it is manifest that the reasonable, alternative method of protecting Chicago's legitimate local health interests which has the "lesser impact on interstate activities" is, quite simply, for Chicago, as does the State of Illinois and every other municipality therein, to rely upon the inspection conducted by the United States Public Health Service certified Indiana sanitarians. Indeed, Mr. Meany admitted on cross-examination that reliance upon Indiana's inspection was a "reasonable, second alternative" to Chicago's own inspection (T. 346). Insistence on

duplicative inspection has not the least, but rather the maximum, impact on interstate activities. Duplicative inspection when legitimate local health interests are fully protected thus contravenes the *Pike* rule. It is therefore unconstitutional.

Chicago's reliance upon one sentence in *Dean* v. *Madison*, 340 U. S. 349 (1951) to support its alleged right to make duplicative inspections is misplaced. That sentence, which simply suggests that a reasonable non-discriminatory alternative to absolute refusal to permit the sale of milk in a city might be on-site inspection, is neither the law of that case nor the law of the land.

At issue in *Dean* v. *Madison* was the question whether a municipality may refuse to permit sale of milk within its boundaries by imposing geographic limits upon the source of such milk. The Court ruled that such refusal constituted an impermissible burden on commerce. The Court further held that a city is constitutionally required to provide reasonable, non-discriminatory alternative means whereby any milk processor who so desires may sell wholesome milk within the city. *Dean* held that a geographic limitation was not a reasonable, non-discriminatory alternative. *Dean* did not hold, nor by way of *dicta* suggest, that a municipality could insist on making its own duplicative on-site inspection where admittedly the milk was wholesome and the shipping state's inspection adequately protected local health interests. Indeed, the *Dean* Court assumed that Madison's interests were *not* adequately protected (340 U. S. 349, 359) and therefore, using the sentence relied upon by Chicago, spoke of Madison's right to conduct its own inspection. It does not follow, and *Dean* does not hold, that if Madison's health interests had been adequately protected by Illinois inspection, that Madison would nevertheless have had a right to insist on duplicative inspection. Indeed, Mr. Justice Black pointed out in dissent that the *Dean* holding meant that if it could be shown that Madison's health interests were adequately protected by Illinois inspection, Madison would be required to rely on that

inspection because it was the least burdensome alternative. 340 U. S. 349, 358.

Judge Tone recognized that *Dean* did not sanction duplicative inspections and quite correctly pointed to this Court's language in *Cottrell* which holds that duplicate inspection is permissible only "[i]n the absence of adequate assurance that the standards of a sister State, either as constituted or as applied, are substantially equivalent to its own . . ." *Cottrell*, 424 U. S. 366, 377; *Dixie*, App. at 36a. As Judge Tone observed, "if such assurance of substantial equivalence is present, the alternative of making its own inspection may not be available to the state authority." *Dixie*, App. at 36a. Such assurance was present here as both courts found. Judge Tone's opinion is obviously entirely consistent with *Cottrell*.

The City of Chicago seeks to escape this logic by arguing that *Cottrell* is not applicable because it involved an economic rather than a health dispute. There are, of course, findings here that this case too involves an economic dispute in that Chicago's policy of insisting on duplicative inspections is used as a device to deny out-of-state processors access to the Chicago market thereby protecting local union jobs (Finding 17, App. 10a). Moreover, the principles discussed in *Pike* and *Cottrell* are not limited to pure economic cases, but involve "the criteria for determining the validity of state statutes affecting interstate commerce." *Pike*, 397 U. S. 137, 142. As this Court long ago observed in *Dean* v. *Madison*, 340 U. S. 349, 354, affixing a "health" label to political activity does not immunize all action taken under the guise of that label:

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instances where a state artlessly discloses an avowed purpose to discriminate against interstate goods."

II.

The Chicago Ordinance Burdens Interstate Commerce.

Both the District Court and the Court of Appeals found that the Chicago ordinance, as interpreted and enforced, burdens interstate commerce. That finding is overwhelmingly supported by the record.

First, the trial court found that by its administration of Chicago's milk ordinance the Chicago Board of Health has discouraged out-of-state milk producers and processors from applying for permits and, further, that Chicago does not speedily and fairly inspect out-of-state milk producers. More specifically, Judge Perry found that Chicago's duplicative inspection policy not only discouraged out-of-state processors from pursuing applications, but also that no out-of-state processor held such a permit (Finding 17, App. 10a). The evidence amply supports this finding. The portion read from Mr. Hewes' deposition reveals that not a single out-of-state pasteurizing plant held a permit to sell its milk in Chicago before this lawsuit was filed (T. 387-388).[2]

The evidence further reveals that not one of the requests by an out-of-state processor received by the Board of Health in the past two years has resulted in issuance of a permit (Finding 17, App. 10a; PX 60). Moreover, Mr. Meany testified that while 25 to 40 inquiries concerning a permit are received by Chicago each year, when told that continuing on-site Chicago inspections are required, "not very many" applicants follow through. None of those are granted permits.

Dixie's experience corroborates the charge that Chicago has burdened commerce by refusing permits to out-of-state dairies. In 1955, after months of preparation, Dixie shipped nearly

2. Three plants physically located in Wisconsin held permits. However, all were branch plants owned by Chicago dairies (Dean, Hawthorn Mellody and Borden) who maintained their principal plants in Illinois.

400 forms and applications to Chicago seeking a permit. No action was taken and the forms were simply sent back in the same box (T. 271-272). In 1969 Mr. Anderson was told by Mr. Meany that it would be "futile" for Dixie to apply for a permit because a new Chicago milk ordinance which was then in committee would soon be enacted (T. 283-284). That ordinance remains in committee today, seven years later. Only after Dixie filed suit, in an obvious effort to abort this litigation, did Chicago inspect and pass Dixie.

Second, Judge Perry found that Chicago's policy of insisting upon its own inspections results in substantial delays before the Chicago Board of Health acts with respect to a permit application (Finding 19, App. 12a). The evidence with respect to Dixie's experience, just detailed, supports this finding.

Third, Judge Perry found that Chicago's insistence on its own inspection would have a seriously adverse effect on Dixie's relationship with its producers in that it may cause producers, who are already subject to Indiana inspection and U. S. P. H. S. audit, to refuse to sell their raw milk to Dixie (Finding 16, App. 10a). Mr. Eskilson, Dixie's president, testified that his producers would quickly tire of confusingly different applications and interpretations of essentially identical standards, and that he believed that his producers might leave him to serve a dairy which is not subject to duplicative inspection (T. 275-278).

Mr. Kjos, Dixie's fieldman for 25 years, testified that in his opinion, based on conversations with Dixie's producers, "the majority" of those producers would leave Dixie and "seek another market" should they be required to submit to duplicative inspections (Finding 16, App. 10a). The result would be that Dixie's production will be significantly curtailed. Chicago offered no testimony to refute Mr. Eskilson or Mr. Kjos.

Finally, Chicago's contention that unnecessary duplicative inspection does not burden commerce because it is free is absurd. As we have seen, duplicative inspection is "free" only in the

monetary sense. Moreover, any regulation of commerce unsupported by local police power needs "burdens" commerce. A municipality is simply without power to regulate commerce absent a police power justification. Regulation without right is burdensome, free or not.

The foregoing overwhelmingly establishes that the evidence justifies Judge Perry's findings that Chicago's policy has, as a matter of fact, burdened commerce.

III.

The Opinion of the Court of Appeals Is Amply Supported by the Evidence.

This was a bench trial. After a week of hearings the court entered lengthy Findings of Fact. The Court of Appeals reviewed those findings and found them, without exception, amply supported in the record (App. 39a). The City's argument that the drinking cups alone require a reversal is patently absurd, especially in view of the fact that upon the re-inspection, *Chicago passed Dixie's farms!* At the time of the second inspection, there had been no changes in the drinking cups.

IV.

Reciprocity Is Not Mandated by the Court of Appeals Decision.

The City of Chicago argues that the decision of the court below requires the City to accept reciprocity. Such, of course, is not the case. Dixie did not seek to force the City to adopt reciprocity, nor does Judge Tone's opinion require such acceptance. Dixie merely requested that it not be subjected to duplicative inspections when admittedly its milk was wholesome. Moreover, Dixie contended, and the proof established, that milk inspected by any jurisdiction (here Indiana) which has adopted the PMO and has entered into the cooperative program with the U. S. P. H. S. is wholesome and perfectly safe to drink.

Therefore, Chicago's health interests are adequately protected by existing Indiana and U. S. P. H. S. inspection, and Chicago's refusal to allow that milk to be sold in Chicago except upon Chicago inspection is unreasonable and thus burdens commerce. Under these conditions, as this Court observed in *Cottrell*, it is the Commerce Clause which creates the necessary reciprocity.

CONCLUSION.

The decision of the Court of Appeals holding the City of Chicago milk inspection ordinance unconstitutional is consistent with this Court's prior decisions and is supported by the evidence. Petitioners have not shown any reason which calls for the exercise of this Court's powers of supervision. The Petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-540

CITY OF CHICAGO, a municipal corporation, THE CHICAGO BOARD OF HEALTH, DR. MURRAY A. BROWN, Commissioner of the Chicago Board of Health, and DR. ERIC OLDBERG, MR. SAMUEL A. GOLDSMITH, DR. THEODORE LAWLESS, MR. WALTER MULLADY, DR. LEE STROHL, DR. MURRAY STEPTO, MR. EDWARD P. BRABEZ, DR. MARY KELLY MULLANE and DR. LEROY P. LEVITT, individual members of the Chicago Board of Health,

Petitioners,

vs.

DIXIE DAIRY COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

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vs.

DIXIE DAIRY COMPANY, a corporation,

Respondent.

REPLY BRIEF OF PETITIONERS

CONCERNING RESPONDENT'S COUNTERSTATEMENT OF THE CASE

(a) The statement in respondent's brief in opposition (p. 2) to the effect that out-of-state inspections by the City of Chicago are not required by the Chicago ordinance but are dictated by mere board of health policy, is inaccurate.

Section 154-17 of the Municipal Code of Chicago provides:

> "*154-17. Inspection of dairy farms and milk plants.* At least once during each inspection period the board of health shall inspect all dairy farms and all milk plants whose milk or milk products are intended for consumption within the city . . ."

Section 154-19 of the Municipal Code of Chicago does state:

> "*154-19. Products shipped from beyond limits.* Milk and milk products from points beyond the limits of inspection may not be sold in the city unless produced and pasteurized under provisions identical with those of this chapter and approved by the board of health. In order that inspections by the board of health may be adequate, thorough, and effective, the board of health may confine its inspections within such points and territorial limits as the board of health may, from time to time, deem necessary to insure economic and proper supervision, and to safeguard and promote the public health of the city."

The ordinance is thus couched in terms of "the limits of inspection." The limits of inspection are not determined by the state boundaries of Illinois, but by what is administratively feasible. Section 254-19 allows the city, in an emergency, to receive milk from distant points on the basis of reciprocity. However, board of health officials testified that they were prepared to send Chicago inspectors "anywhere."

Dixie's pasteurization plant is not lcoated in Florida or California, but in Gary, Indiana—less than 50 miles from the city limits of Chicago. Dixie's plant and supplying farms are all well within the limits of routine inspection by Chicago inspectors. They have in fact all been inspected by Chicago inspectors, pursuant to a discovery order entered by the district court. That there is

nothing unusual in such inspections is proven by the fact that the Indiana State Board of Health routinely inspects more than 500 dairy farms in Illinois, Michigan and Ohio (T. 222, 223).

(2) Respondent's assertion (Brief in Opposition, p.2) that Chicago's representation (Petition, p.12) that Dixie has not sought a Chicago permit since 1955 is "patently false" is not borne out by the record. Dixie's last actual application for a Chicago permit was in 1955. (T. 271.) If Dixie's application was wrongfully frustrated in 1955, as Dixie insinuates, Dixie certainly was guilty of laches in waiting until December 23, 1970—15 years later—before seeking equitable relief.

Dixie's account of its 1969 oral inquiry about the possibility of obtaining a Chicago permit does not make sense. Respondent asserts that the chief sanitarian for the Chicago Board of Health, James Meany, told Dixie's representative that "its application would be 'futile' because there was currently pending before a committee of the City Council a bill to permit reciprocal inspection and no action could be taken until passage of the bill" (Brief in Opposition, p.3). Such pendency of an amendment would not make an application by Dixie futile; it merely offered the possibility that Dixie's obtaining a Chicago permit might be simplified if the bill was adopted. Dixie's representative in that conversation, Jorgen Andersen, the company's secretary, testified that Meany told him the amended ordinance would probably be ready in "a month or five weeks" (T. 283). But the proposed amendment was rejected by the city council. In any event, Dixie did not apply for a Chicago permit in 1969, but at most made a feeble oral inquiry about the possibility.

(3) Respondent's claim (Brief in Opposition, p. 3) that it was merely "in an obvious attempt to moot the lawsuit" that Chicago, after inspecting Dixie pursuant to a district court order, passed Dixie, is no more than partisan speculation. Chicago inspected Dixie and its farms twice. The first time Dixie flunked. It can be reasonably assumed that Dixie then made some corrections. Then Chicago reinspected Dixie, as respondent admits (Brief in Opposition, p.10), gave it a passing grade and offered it a permit.

(4) The discrimination issue was eliminated from this lawsuit by the district court's striking the discrimination count and by Dixie's failure to appeal that ruling. The opinion of the court of appeals (App. 332) so notes and states;

> "[T]he issue of discrimination was removed from the case and is not before us."

Nevertheless, despite this statement, the court of appeals held (App. 37a, 38a) that the district court was entitled to draw the inference that "the reason for the failure of out-of-state processor to obtain permits has been the duplicative inspection requirement of the Chicago ordinance . . . notwithstanding the paucity of direct evidence on this subject."

(5) The brief in opposition (p. 4) is in error in asserting that Chicago's thesis "that the additional inspection conducted by the City of Chicago Board of Health better insures the safety of the milk to Chicago residents" was found by both the district court (Finding 12, App. 8a) and the court of appeals (App. 40a, n. 13) to be "totally unwarranted". The references do not substantiate the assertion. The district court's Finding 12 states no more than that Dixie's milk is wholesome and that "Chicago

can rely upon Indiana and U.S. P.H.S. inspection to fully protect Chicago's health interests." Footnote 13 in the court of appeals' opinion likewise says nothing about the claim of Chicago, that its additional inspection better insures the safety of milk consumed by Chicago residents, being totally unwarranted. On the contrary, the opinion notes that Indiana "failed to assess demerits for cattle drinking cups which were fed by submerged inlets, although such devices are not permitted by the model ordinance." However, the court of appeals chose to regard this as a "minor variance[s]", although under the model ordinance promulgated by the USPHS, the item of cattle drinking cups fed by submerged inlets is grave enough to draw a demerit of 5 points, where 90 out of a possible 100 points is passing.

It is obvious to common sense that double-checking what has been checked by someone else is more reliable, more adequate than relying upon a check by someone else. In matters of safety, we reiterate, maximum safety is a matter of right.

ARGUMENT

I.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE RULING OF THIS COURT IN *DEAN MILK COMPANY v. CITY OF MADISON, WISCONSIN.*

Respondent has made an heroic attempt in its Brief in Opposition (pp. 6,7) to convolute *Dean Milk Company v. Madison*, 340 U.S. 349 (1951), to its own uses, but even its skill is unequal to that impossible task.

Nowhere in the majority opinion of this Court in that well-known case is it assumed that "Madison's interests were *not* adequately protected . . . by Illinois inspection." as the Brief in Opposition (p.6) asserts (emphasis supplied by respondent), and that "therefore . . . [this Court] spoke of Madison's right to conduct its own inspection" (idem.). On the contrary, this Court stated in *Dean* (340 U.S. at 354),

> "this regulation . . . in practical effect excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois."

Nor did *Dean* require the municipality to choose "the least burdensome alternative", as the Brief in Opposition (pp. 6,7) strives to imply. On the contrary, the opinion of this Court declared (340 U.S. at 355):

> "It appears that reasonable and adequate alternatives are available. If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors . . . [A]n alternative proposal [is] based on § 11 of the Model Health Ordinance recommended by the United States Public Health Service."

This Court held that since Madison had both these alternatives open to it, the ban on all but local milk was "not essential for the protection of local health interests and place[d] a discriminatory burden on interstate commerce."

The respondent's discussion (Brief in Opposition, pp. 2,3) of Justice Black's dissenting opinion in *Dean* (340 U.S. at 357-360) is even more confused. Respondent portrays the Black dissent as stating that "the *Dean* holding meant that if it could be shown that Madison's health interests were adequately protected by Illinois inspection, Madison would be required to rely on that inspection because it was the least burdensome alternative."

Nowhere in his dissent did Justice Black say anything of the sort. On the contrary, he declared (at 360), "I do not think that either of the alternatives suggested by the Court would assure the people of Madison as pure a supply of milk as they receive under their own ordinance."

It was Justice Black's opinion (at 357) that, "[a]s a practical matter . . . Dean can easily comply with the ordinance whenever it wants to. Therefore, Dean's personal preference to pasteurize in Illinois, not the ordinance, keeps Dean's milk out of Madison." The applicability of this observation to Dixie in the case at bar is obvious. Not Chicago's ordinance, but Dixie's own unwillingness to submit to Chicago inspections is keeping Dixie out of the Chicago market.

With his characteristic candor Justice Black then went on to declare (at 359, 360):

> "No case is cited, and I have found none, in which a bona fide health law was struck down on the ground that some other method of safeguarding health would be as good as, or better than, the one

> the Court was called on to review. In my view, to use this ground now elevates the right to traffic in commerce for profit above the power of the people to guard the purity of their daily diet of milk."

Both of the valid alternatives adumbriated in the majority opinion in *Dean* Justice Black thought inferior to the Madison ordinance. He criticized the system of fees for on-site inspection, suggested by the majority, as bound to lead to litigation over calculation of the charges. That criticism has been obviated in the Chicago ordinance, since Chicago makes such inspections without charge and at its own expense.

The reciprocity system based on the U.S.P.H.S. model ordinance Justice Black considered markedly inferior (at 259, 360). He noted that the model ordinance requires reliance on "spot checks . . . based on random selection of farms and pasteurization plants," that "the United States Public Health Service rates the ten thousand or more farms in the Chicago milkshed by a sampling of no more than two hundred farms," and "[t]he same sampling technique is employed to inspect pasteurization plants." The result, Justice Black stated, is "neither the farms supplying Dean with milk nor Dean's pasteurization plants were necessarily inspected in the last 'spot check'."

We are confident Justice Black would think no more highly of Dixie's arguments in the case at bar.

The court of appeals was not misled by the respondent's attempt to rewrite *Dean*. However, as has already been noted in our petition for certiorari (pp. 26,27), that court was of the opinion that *Dean* had been modified by this Court's recent ruling in *Great Atlantic and Pacific Tea v. Cottrell*, ... U.S. ....., 47 L. Ed. 2d 55.

Cottrell was decided on February 25, 1976, more than a month after oral argument was had in the court of appeals in the instant matter on January 19, 1976.

In holding *Cottrell*, with *Pike*, determinative here, the court of appeals declared (538 F. 2d at 1307; Petition, App. p. 34a):

> "Before the formulation of the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), and the reaffirmation of that test in *Great Atlantic and Pacific Tea Co. v. Cottrell*, the argument in favor of the constitutionality of the Chicago milk ordinance would have been more persuasive."

The court of appeals then went on to find *(Idem)*:

> (1) The Chicago ordinance does not purport to discriminate against interstate commerce;
>
> (2) The policy decision and legislative judgment underlying a state regulation designed to protect the public's health or safety are not subject to review by a federal court;
>
> (3) The burden the Chicago ordinance lays on interstate commerce is "incidental";
>
> (4) The Chicago ordinance is not inconsistent with the regulations of other states in a field in which uniformity is important to the national interests in unimpeded commerce; and
>
> (5) The added expense to interstate businesses of complying with the regulation would not justify a court in striking it down.

Nevertheless, despite all these findings in favor of the Chicago ordinance, the court of appeals held that the reference in *Dean* to the two permissible alternatives open to a municipality of choosing between reliance on reciprocity and of making its own inspections, no matter where, is now "qualified" by the phase "[i]n the absence of adequate assurance that the standards of a sister state, either as constituted or applied, are substantially

equivalent to its own," with the result that, if such "adequate assurance" is present, then the municipality is stripped of the power to make its own on-site inspections.

Pike and *Cottrell* are not applicable. They were not health, but economic cases, aimed directly at impeding interstate commerce. *Pike v. Bruce Church, Inc.*, 397 US 137 (1970), concerned an Arizona statute that prohibited the shipment of cantaloupes grown in Arizona out of that state unless they were first packed in an Arizona packing facility. *Great Atlantic and Pacific Tea Co., v. Cottrell*, ... U.S. ..... 47 L. Ed. 2d 55 (1976), had to do with a Mississippi statute that did not permit the shipment into that state of milk from another state, unless the other state accepted Mississippi milk on a basis of reciprocity. Both of these measures were disruptive of the national common market created by the Commerce Clause of the Constitution.

We respectfully submit that the language in *Pike* and *Cottrell* concerning balancing alternatives and requiring selection of the alternative that least burdens interstate commerce was actually unnecessary to the results reached there and is *obiter dicta*. The Arizona and Mississippi statutes in those cases were both *per se* impermissible interferences with interstate commerce.

But state or local legislation, enacted under the police power of the state or municipality to protect the health of the community, is permissible, even though it may have some effect on interstate commerce. *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 (1829); *License Cases*, 5 How. 504, 12 L. Ed. 256 (1847); *South Carolina Highway Department v. Barnwell Bros.*, 303 U.S. 177 (1939); *Milk Board v. Eisenberg*, 306 U.S. 346 (1939); *H. P. Hood & Sons v. DuMond*, 336 U.S. 525

(1949); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen v. Chicago R.I. & P.R. Co.*, 393 U.S. 129 (1968).

The opinion of the court of appeals loses sight of the fact that it is dealing with the validity of legislative action in the proper domain of health regulation, and that this is presumptively valid unless the party attacking the legislation demonstrates the contrary by clear and convincing evidence. The burden should not be placed on the state or local government to justify its legislation as the measure with the least impact on interstate commerce.

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, at 729, 730 (1963). As this Court stated in *Day-Brite Lighting, Inc., v. Missouri*, 342 U.S. 421, at 423 (1952),

> "[W]e do not sit as a superlegislature to weigh the wisdom of legislation."

II.

RESPONDENT HAS FAILED TO PROVE THAT THE CHICAGO ORDINANCE BURDENS INTERSTATE COMMERCE.

Nowhere does the respondent respond to our observation (Petition, p.30) that no Indiana farmers testified that they could not or would not sell milk to Dixie if they had to submit to Chicago inspections. Nowhere does respondent address itself to our criticism of the meager testimony of its president, Mr. Eskilson, and its long-time employee, Mr. Kjos, as to their guesses what might happen if Dixie complied with the Chicago ordinance (Petition, pp.30, 310. The testimony of Eskilson and Kjos refutes itself by its flimsy inconsequentiality.

Nowhere has respondent come to grips with our comment on the failure of any representative of a single out-of-state milk company other than Dixie to testify against the Chicago ordinance or declare under oath that their company was unfairly excluded from Chicago.

The various out-of-state milk companies mentioned in district court finding 17 (Petition, pp.10a, 11a) did not apply for Chicago permits. They inquired whether they could enter the Chicago market on the basis of reciprocity—that is, on their own terms. To paraphrase Justice Black, it is not Chicago's ordinance, but their own unwillingness to comply with the Chicago ordinance and undergo Chicago inspections that keeps them out of the Chicago market.

The opinion of the court of appeals (Petition, p.36a, fn. 9) notes,

> "Three out-of-state plants holds Chicago permits. Dixie characterizes them as 'branch plants owned by Chicago dairies to which the city responds that one of them, Borden, is a national company with only a regional office in Chicago."

In any event, no matter who owns these plants, it is undisputed that they are all located in Wisconsin—in Fond du Lac, Whitewater and Janesville. These are not mere farms, but pasteurization plants. No doubt they are manned by local employees.

There is no evidence in the record that Chicago administers its ordinance unfairly or dilatorily. The opinon of the court of appeals acknowledges (Petition, p.38a) there is a "paucity of direct evidence on this subject" of alleged deterrence of out-of-state milk processors by Chicago inspection requirements.

If Dixie, or any other out-of-state milk processor, wants to sell its milk in Chicago it should comply with

the Chicago ordinance, the terms of which are not onerous, but reasonable. If, in practice, Chicago treats the application unfairly, then and only then should Dixie or any other processor be afforded equitable relief.

III.

THE COURT OF APPEALS ACCEPTED THE FINDINGS OF THE DISTRICT COURT UNCRITICALLY.

The Brief in Opposition (p. 10) fails to respond to our observation (Petition, pp.32, 33) that the opinion of the court of appeals repeatedly accepts the findings of the district court as evidence (App. 37a, 38a, 39a)—findings that were prepared by respondent's counsel.

Respondent notes (*idem.*) that "upon the re-inspection, Chicago passed Dixie's farms." Thus, respondent admits that, before Chicago offered Dixie a permit, Chicago inspected Dixie's farms twice, pursuant to the discovery order. It can be reasonably assumed that some corrections were made on the Dixie farms in the interim. Otherwise, why the second inspection? The assertion in the Brief in Opposition (p.10) that "[a]t the time of the second inspection, there had been no changes in the drinking cups," is without support in the record.

IV.

THE OPINION OF THE COURT OF APPEALS DOES MAKE THE VOLUNTARY RECIPROCITY PROGRAM COMPULSORY.

Respondent's statement in its Brief in Opposition (p. 10) that "Dixie did not seek to force the City to accept reciprocity, nor does Judge Tone's opinion require such acceptance," evinces a remarkable lack of realism.

Under *Dean v. City of Madison*, Chicago had two alternatives: (1) conduct its own inspections or (2) rely on reciprocity. The opinion of the court of appeals, in the belief that *Dean* had been modified by *Cottrell*, affirms

an injunction against Chicago making its own inspection of Dixie's Indiana plant and dairy farms.

That clearly results in requiring Chicago to permit Dixie's Indiana milk to be sold in Chicago on the basis of the Indiana inspection, accepted reciprocally. For Chicago cannot exclude out-of-state milk from Chicago, even if it wanted to (which it does not), for that would constitute an unconstitutional embargo on interstate commerce.

Thus, without any preempting legislation by the Congress, the ruling of the court of appeals converts the voluntary reciprocity program sponsored by the USPHS into something the City must accept.

This determination deprives the City of Chicago of its right, established since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 235 (1929), to enact and enforce local health and safety measures—in the absence of preempting federal legislation—even though the legislation affects interstate commerce.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue and the judgment of the court of appeals should be reversed.

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